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72-1086

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon and the Court of Appeals of the State of Oregon, Department 2.

OPINIONS BELOW

The Supreme Court of the State of Oregon without opinion on November 8, 1972 (App. p. 1a) denied a petition to review the judgment and opinion of the

Court of Appeals of the State of Oregon, Department 2, reported in 94 Oregon Advance Sheets 983, 495 P. 2d 1215 (1972), affirming the unreported opinion (in the form of a letter to counsel dated January 31, 1969) of the Circuit Court, Marion County, Oregon (App. p. 3a). The Supreme Court without hearing or opinion, on December 12, 1972 denied (App. p. 2a) a petition for reconsideration of the petition for review and a supplemental petition for reconsideration.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon denying the petition to review the judgment of the Court of Appeals was entered on November 8, 1972 (App. p. 1a). The judgment of the Supreme Court of the State of Oregon denying the petition and supplemental petition for reconsideration of the denial of the petition for review was entered on December 12, 1972 (App. p. 2a). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the failure of both the Trial Judge and the Respondent, adverse party below, to disclose to Petitioners, prior to trial and judgment, the substantial and concurrent business relationship between the Judge and Respondent, (consisting of the purchase of a large tract of real estate from plaintiff-Respondent by a partnership of three partners including the Trial Judge), and the subsequent trial and determination of the controversy by such Trial Judge deprived Petitioners, defendants below, of due process of law in violation of the Fourteenth Amendment.

2. Whether the Trial Judge denied Petitioners due process of law by a specific ruling discrediting all of the evidence of Petitioners in a lengthy trial because Petitioners did not call to the witness stand one certain witness whose deposition was taken for trial purposes by stipulation of the parties, and admitted by the Trial Judge as evidence during the trial.

3. Whether the Trial Judge denied Petitioners due process of law by entering a declaratory judgment finding Petitioners liable for any damage due to delay incurred by a third party, severed from this case at pretrial, who instituted a separate action in another Oregon Circuit Court against Petitioners which was pending at the time this case was tried and decided and still is pending.

4. Whether Petitioners were denied due process of law by Respondent's introduction at the trial, and the Trial Court's material reliance upon, exhibits fraudulently offered and substantially altered.

STATUTES INVOLVED

The Statutes of Oregon in respect of disqualification of a judge (ORS 14.250 ff.) are found in the Appendix, p. 50a.

STATEMENT OF THE CASE

The facts in this due process case are simple, uncontested and shocking:

They involve principally the failure of a Trial Judge to disclose to Petitioners, one party to a highly publicized breach of contract suit involving millions of dollars, a private, long-standing and profitable business

relationship with the other party (Respondent State of Oregon), existing during the pendency (including the pre-trial proceedings) of this litigation on the contract between the parties for construction of foundations for the Astoria Bridge over the Columbia River. This relationship, had it been disclosed, would have given the aggrieved party an absolute right under Oregon state law to recuse the Judge. The case involves further the failure of the Supreme Court of Oregon to grant relief or even a hearing under its discretionary review jurisdiction or supervisory powers, when these facts, accidentally discovered by Petitioner while the case was under review in the State Supreme Court, were timely brought before it.

One important point must be made at the outset: This petition is not the result of baseless, harassing or vexatious litigation in court after court by a disappointed litigant (as in *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.,* 441 F. 2d 631 (1971), certiorari denied, 404 U.S. 941.[1] In the instant case a factual and substantial business relationship between the Trial Judge and the adverse party was discovered and brought to the attention of the Supreme Court of Oregon in October, 1972. The only factual comment made by Respondent was not a denial of any of the substantive allegations of an undisclosed business relationship between Respondent and the Trial Judge, but a protest that no showing has been made that the

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[1] As shown below, *Kinnear-Weed* dealt solely with the Federal Disqualification Statute, 28 U.S.C. 455. The Oregon Disqualification Statute differs substantially from the Federal State, in that it does not commit disqualification to the discretion of the trial judge, provided that the affidavit demanding such disqualification is based on reasonable grounds. ORS 14.260 (App. p. 50a).

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substantial and recent transaction complained of "will ultimately be profitable".[2]

It is also important to keep in mind that the affidavits of prejudice filed, *nunc pro tunc* upon discovery of the business relationship involved, were signed (as is this Petition) by a member of the Oregon Bar of years' standing who at one time was the Chairman of the Judicial Fitness Commission and by a member of a large firm of many years' standing in the Oregon Bar. The concern in this case is one that reaches beyond that of unsuccessful litigant-Petitioners. It is the concern of the public and of the Bar for the integrity of the judicial system.

Chronologically and summarily stated, the facts are as follows:

In August, 1964, Petitioners' action against Respondent on their contract in the U.S. District Court for Oregon was dismissed as forbidden by the Eleventh Amendment. *DeLong Corporation* v. *Oregon State Highway Commission,* 233 F. Supp. 7, affirmed 343 F. 2d 911, cert. denied 382 U.S. 877.

On December 15, 1964, Respondent's Board of Control, consisting of the Governor (who appointed Judge Jones), the Secretary of State and the State Treasurer,

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[2] "Defendants [Petitioners here] blatantly assume that this was a favorable transaction for Judge Jones and his associates. There is no evidence that the land has been resold or that their extensive agricultural enterprise will ultimate be profitable. The only possible basis for plaintiffs' claim is their reference to the reappraisal of the Colony Farm along with other property in connection with the loan from the Prudential Insurance Company".—Defendant's Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. (US DC, Dist. of Oregon, C.A. 73-20).

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approved a request "originating with Judge Jones" to purchase Colony Farm and to rent it at $30.00 an acre pending title clearance (Minute Book of Board of Control, App. p. 14a).

Respondent, on August 30, 1965, by and through its Highway Commission, filed its complaint against Petitioner in the Circuit Court of the State of Oregon for the County of Marion. The Circuit Court at that time was composed of four Judges. The presiding Judge (because of his administrative commitments in that capacity and because of his close social relationship with Special and Chief Trial Counsel for the State) declined presiding at any trial of the case. Another associate Judge was assigned primarily, if not exclusively, to domestic relations cases. A third Judge was disqualified by Respondent for the remote reason that his attorney brother was an office associate of counsel for a secondary party whose case had been severed in pretrial proceedings. Thus the only remaining Judge, the actual Trial Judge, Judge George A. Jones, at all times was the most likely, if not the only Judge, to be assigned to the trial below. This Judge assumed full control of the case in the pretrial deposition stage.

On February 1, 1966, Respondent's Board of Control accepted Judge Jones' offer to purchase Colony Farm for $175,000.00, $25,000.00 down and a 20-year payout at 5½% interest (Contract of Sale, App. p. 21a). The sale price was based on a July, 1965 appraisal made by Don J. Mason of Salem, who also made appraisals for the State of Oregon Highway Commission (App. p. 30). The 1965 appraisal and 1966 sale price average out to approximately $421.00 per acre (App. p. 17a). During the pendency of this case in the

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Marion County Court (though prior to its formal assignment), the partnership in which Judge Jones owned a one-third interest was therefore indebted to Respondent in an amount of approximately $150,000.00.

On July 5, 1967, shortly before the case was set for trial, the Trial Judge and his partners borrowed $700,000.00 from Prudential Insurance Company secured by a mortgage on the State property and adjoining property purchased by the partnership from third parties. This loan was used to prepay the entire twenty-year debt then owed to Respondent. The average valuation of all the property mortgaged in the refinancing was $650.00 per acre, an increase in average value in one year of more than 50%. (App. p. 17a).[3]

In view of the prior federal and pending state litigation the controversy between Petitioner and Respondent was not a minor case resting unnoticed in the files of the Clerk of the Circuit Court of Marion County. The controversy involved was well publicized in the newspapers of Oregon. It involved the construction of foundations for a gigantic interstate highway bridge over the Columbia River, just a two-hour drive from the Marion County Courthouse. Not only the legal community, but also the business community of the State, as well as the general public, were well aware of the names of the parties, the millions of dollars involved, and the adamant position taken by Respondent State of Oregon in the controversy. The whole matter

[3] No allegation is intended or should be implied either that a preference was shown to the Trial Judge by the State officials or that he received a windfall, or that the loan on the property was obtained when it was, and the indebtedness to the State paid, in order to complete the purchase from the State before a proceeding to try this case in which the State was a party.

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received considerable newspaper attention, not only in all the press of Oregon, but also the press of Seattle and other Washington papers, and even in the New York Times. Furthermore, the also highly publicized collapse of the John Day Bridge and the problems with other bridges designed by the State of Oregon Highway Commission, all in the same period of time, were connected in publicity with this case. DeLong Corporation asserted (and still asserts) that the State was responsible not only for the delay but also for millions of dollars' damages suffered by DeLong. The controversy, therefore, was so bitter, vocal and much discussed that it must be presumed that the Trial Judge knew of it long prior to the actual filing of this action.

The trial below before Judge Jones without a jury extended over a six-month period and included 493 exhibits and 9038 pages of testimony. It resulted in a short letter opinion to counsel containing several completely unfounded and indefensible holdings whose magnitude amount to an unconstitutional denial of due process, rather than being simply legal error of an unbiased Trial Judge. Among them is the holding of the Trial Court (App. p. 7a):

> "It is evident from the foregoing that any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defendant and the Court so declares".

United States Steel Corporation had originally been a party to the action below but had been dismissed at pretrial. This company then re-filed two separate cases against Petitioner and Respondent herein in a different Circuit Court in the State of Oregon. Neither

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case has been tried and no proof as to the responsibility for damages due to delay, if any, incurred by United States Steel (let alone the extent of such damages) has been adduced anywhere. Nor has any evidence been adduced or trial been had on any defense that either Respondent or Petitioner might have against United States Steel. The declaration by the Trial Court constituting a "resolution" of all these complicated issues is based on no process of law; it certainly was not arrived at by due process.

Another and the most bizarre denial of due process to be brought to the attention of this Court is the Trial Court's discrediting of all of Petitioner's evidence, in patent mis-application of an Oregon statute relating primarily to jury instructions, but apparently misunderstood and relied upon by the Trial Judge as the sole trier of the facts.

The Trial Court ruled (App. p. 5a):

> ". . . Defendant had potential witnesses under his control, for instance Colonel DeLong, that did not appear during the trial. This in the face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution".

Prior to trial, it had been stipulated that Witness DeLong, because of his required presence in Vietnam, would testify by deposition. His absence at trial was anticipated by all parties and a deposition for trial purposes of 222 pages was taken. The Court, during trial, ruled on the objections made during the deposition and admitted the testimony in evidence without

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hesitation or comment, and certainly without warning that Petitioners were endangering months of oral and documentary testimony. It was months after the trial and in the letter opinion that the Trial Court announced that it viewed not only Witness DeLong's testimony, but all of Petitioner's evidence "with caution",[4] because his body was not timely produced in the Courtroom. Because of his failure to elucidate further, Petitioners have a right to and must assume that their entire case was fruitless and tainted because one witness testified via perpetuated testimony instead of in person.

Still another matter of constitutional magnitude involves extrinsic fraud. This Court is not requested to review on direct appeal or by this petition any bona fide errors committed by the Trial Judge. Therefore, no detailed statement of the issues below is required. However, certain unlawful holdings by the Trial Judge and certain instances of fraud practiced upon the Trial Court are of such magnitude that they amount to a denial of procedural due process. They are therefore included as subsidiary questions for review and must be recounted in this statement, not only in support of the questions presented, but also to round out the picture of actual harm done to Petitioners, over and above

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[4] Despite the "for instance" reference to Colonel DeLong, no specific finding was made as to any other "potential witnesses" under Defendants' control who did not appear, nor does the Record show any such witnesses. Every witness under control of Petitioners called by the State of Oregon was produced. There were a great number of State witnesses who did not appear, particularly the ones that actually authored the questioned exhibits, but no reference to the failure of the State to produce not only potential but absolutely necessary witnesses under its control at the trial can be found in the Opinion.

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the violation of its constitutional right to trial before a fair and unbiased Judge.

Despite the length of the trial, the wealth of testimony and documentary evidence produced, the Trial Court in its brief letter opinion decided the case in favor of Respondent on the narrow issue of whether defective concrete seals in a single pier, Pier 169, of the substructure of the bridge had been the fault of Petitioner or the fault of the State. The Trial Court (affirmed by the Court of Appeals) held for Respondent, the State of Oregon, and relied on a finding that Petitioner had negligently placed the concrete in the Columbia River. (App. pp. 5a-6a).

The key evidence relied upon by the Trial Court in finding for Respondent was Plaintiff's Exhibits 113 and 488 and the testimony supporting their introduction. The entry in Exhibit 113 was relied on to prove negligent work in placing the concrete. Witness Ellison, the Field Engineer for the State, testified that it was an original diary; had been kept under his supervision and that he did not know of "anything that has been deleted from them or added to them or edited in any way" (R. 321-322). The key point in the diary, upon which Respondent State's expert witnesses and the Trial Judge relied, related to an alleged defective pipe through which the concrete was poured. (App., pp. 6a, 55a). This was, by judicial admission, the only evidence in the Record supporting this finding (R. 8547-8549). Contrary to the testimony to the effect that nothing was added to the diaries, this key item was indeed later added at page 19 of Exhibit 113. How much later we do not know, but we now realize that different writing instruments were used, the writing

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was not continuous, and changes were made even to the alterations.

Petitioner destroyed the impact of the questionable Exhibit 113 by obtaining and introducing, late in the trial,[5] the State's own laboratory reports of samples of the concrete actually poured, Defendant's Exhibit A-15, which sets forth the actual formula employed in mixing the concrete for Pier 169. This formula was concededly the State's sole responsibility (R. 8589; 8596). The State's own expert testified that this State-prescribed and State-analyzed formula would not produce proper concrete (R. 8439-8444). It was Oregon, therefore, that was responsible for the defective seals at Pier 169.

The pendulum had swung full course; the State had lost its case. The State instead of attacking the laboratory reports, produced another "document", again identified by Witness Ellison as a contemporaneously prepared set of diary-type documents, Exhibit 488. This exhibit consisted of tabulation sheets of the number of bags of materials shipped to the pier site for making or mixing the concrete there. Allegedly, the State inspectors had placed a concrete formula on these sheets for their ready reference.

The probative value of this new evidence again rested entirely on Witness Ellison's testimony that the concrete formula was inserted in the sheets at the exact time of the tabulations and by the State inspectors signing the documents. It has been discovered that these entries were made by unidentified persons at times different from those making the tabulations.

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[5] The State had successfully resisted discovery of these reports until the trial was almost over. (R. 7373; 8583).

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Thus, in a full and fair trial, Petitioner would have prevailed, for no one can make good concrete out of the wrong materials and the Record is now conclusive that Respondent's technical errors caused the bad concrete.[6]

The special business relationship between Judge Jones and Respondent and the use of altered exhibits were discovered accidentally while the case was under review and during a factual investigation relating to the merits of the case (App. p. 13a). As soon as a responsible presentation could be made, it was made to the Supreme Court of Oregon in the Supplemental Petition for Review. With this Supplemental Petition for Review, Chief Counsel for Petitioner DeLong and Chief Counsel for Travelers, the surety below, filed statutory affidavits of prejudice in an attempt to recuse the Judge *nunc pro tunc* (App. p. 8a). As shown below, the filing of these affidavits prior to trial would have forced Judge Jones to disqualify himself without any showing of actual prejudice being needed.

The only ruling, if any, Judge Jones could have made under Oregon law upon the filing of such affidavits would have been on the issue whether the fear of prejudice asserted in the affidavits was a reasonable one. By his failure to disclose the relationship, he deprived Petitioner of an opportunity to submit this issue to him or any appellate Court. The Supreme Court of

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[6] One of the many oddities of this case was the fact that more than a month after the alleged diary entry in Exhibit 113 relied on by the Trial Court to find a breach of contract by Petitioner, Witness Ellison gave a newspaper interview in which he stated that he did not know what had "gone wrong". Seattle Post Intelligence, February 16, 1964, p. B1.

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Oregon, which had discretionary jurisdiction (and supervisory power) to remand the case to Judge Jones or to another Circuit Court Judge, on this only remaining issue, i.e., whether the affidavits were based on a reasonable fear of prejudice, declined to exercise this jurisdiction or power. This petition follows.[7]

REASONS FOR GRANTING THE WRIT

I. The Failure of the Oregon Supreme Court To Grant a New Trial in View of the Trial Court's Undisclosed Business Relationship With Respondent Deprived Petitioners of Due Process of Law.

The Supreme Court of Oregon below, in denying the Petitioners' supplemental petition to reconsider denial of the petition to review the decisions of the lower state courts because of the newly discovered substantial business relationship between the Trial Judge and the Respondent, decided a federal question of substance in a manner contrary to recent and controlling decisions of this Court. *Commonwealth Coatings Corp* v. *Continental Gas. Co.*, 393 U.S. 145; cf. *Ward* v *Monroeville*, decided November 14, 1972, 93 S.Ct. 80 *Tumey* v. *Ohio*, 273 U.S. 510.

In *Commonwealth, supra,* this Court stated (p. 148)

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of

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[7] On January 10, 1972 Petitioners filed in the U.S. District Court for the District of Oregon, their original complaint in equity to enjoin collection of the judgment, together with their motion for a temporary restraining order and a preliminary injunction. As of the filing of this petition, these motions are under advisement. The District Court has requested additional briefing on the applicability of the Eleventh Amendment to the Constitution and the anti-injunction statute, 28 U.S.C. § 2283 as barring the exercise of the District Court's equity powers.

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> justice had, unknown to the litigant, any such relationship [an arbitrator's business relationship with a party to the proceedings, less substantial than Trial Judge's relationship with the Plaintiff-Respondent here] the judgment would be subject to challenge".

The instant case presents a much more compelling situation for review than *Commonwealth, supra.,* both because of the more substantial business relationship involved and also because of the principle that a Judge in a court of justice, here a Trial Judge of the facts as well as the law, is held to a higher standard of impartiality and of freedom from entangling business relationships with litigants than an arbitrator drawn from the business community of the litigants.

1. In *Commonwealth* the disqualified arbitrator was a consulting engineer whose firm had received $12,000.00 for professional services rendered to one party over a period of five years, the last transaction having occurred more than a year prior to the arbitration. But even though both lower Courts had determined that the arbitrator acted without any prejudice, and the complaining party did not claim actual prejudice, this Court determined that failure to disclose the relationship required reversal and setting aside of the award.

Here we find undisputed documentary evidence in Respondent's official state records that after this action was commenced on August 30, 1965 the Respondent on February 1, 1966, acting through its State Board of Control, composed of Respondent's Governor, Secretary of State and Treasurer, accepted an offer from Green Villa Farms, a partnership of three equal partners including the Trial Judge, to purchase a tract

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of land known as Colony Farm for $175,000.00 on a valuation by a State appraiser, a part time consultant for the State Highway Commission which was directly involved in this case.[8] The contract of sale (App. p. 21a), executed on February 22, 1966 by Respondent's Governor Mark O. Hatfield, Secretary of State Tom McCall and State Treasurer Robert W. Straub and on February 23rd by the three partners including the Trial Judge, George A. Jones, provided favorable terms of $25,000.00 down payment with the balance payable in equal payments in 20 years at 5½% interest. The buyers could immediately take possession of the property and a Bargain and Sale Deed to the property was to be delivered when the balance of the purchase price was paid. Thus, the Trial Judge and his partners were indebted to Respondent in the amount of $150,000.00 while this well publicized case, brought by Respondent, was pending in his Court. On July 5, 1967, shortly before this case was formally assigned to and accepted by the Trial Judge,[9] he and his partners obtained a loan of $700,000.00 from Prudential Insurance Company secured by a mortgage (App. p. 18a) on this tract and adjoining land owned by the partnership. From these proceeds the partners paid Respondent the balance of $150,000.00. Then a Bargain and Sale Deed dated June 23, 1967 and recorded on July 5,

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[8] The relationship of the Trial Judge with the Respondent was unearthed accidentally in investigating other aspects of the case (App. p. 13a).

[9] Respondent obtained disqualification of one of the three available Judges by asserting relationship between the Judge and attorney for one of the subordinate parties in the construction project. The second Judge refused to take the case because of administrative duties so that Respondent in effect chose the Judge before whom the case was tried.

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1967 to the individuals comprising the partnership, including the Trial Judge, was executed by Respondent's then Governor Tom McCall, Secretary of State Clay Hyers and State Treasurer Robert W. Straub (App. p. 20a).[10]

Thus we find that the Trial Judge accepted assignment of this case, involving complex factual and legal issues for trial without a jury, without either the Trial Judge or the Respondent disclosing the very substantial contemporaneous real estate transaction between them so favorable to the Trial Judge through his partnership. No other evidence than the recorded documents is required.

2. On principle a Trial Judge exercising general and unlimited jurisdiction should be held to a standard of judicial ethics at least as high as the arbitrator in *Commonwealth, supra.* In that case the Court quoted, as comparable to the rule of the American Arbitration Association requiring a disclosure of relationship with a party, Canon 33 of the Canons of Judicial Ethics as follows (p. 149):

> "33. Social Relations.
>
> ". . . [A judge] should, however in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business

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[10] Another mortgage (App. p. 28a) in favor of Prudential Insurance Company was recorded on May 17, 1971 to secure an additional loan of $345,000.00 to the Trial Judge's partnership for total loans of $1,045,000 on the land purchased from the Respondent for $175,000.00 and adjoining land owned by the partnership.

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> relations or friendships constitute an element in influencing his judicial conduct."[11]

Even the concurring and dissenting opinions in *Commonwealth,* recognizing the degree of independence of arbitration awards from judicial review, also recognize the need for a stricter standard for judges. Mr. Justice White in the concurring opinion joined by Mr. Justice Marshall states (p. 150):

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."

Mr. Justice Fortas, with whom Mr. Justice Harlan and Mr. Justice Stewart joined, in his dissenting opinion states (p. 155):

> "The Court applies to this process rules applicable to judges and not to a system characterized by dealing on faith and reputation for reliability."[12]

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[11] The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association on August 16, 1972 provides in Canon 5 "A Judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties" and then goes on to provide in subdivison "C Financial Activities—(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transaction with lawyers, or persons likely to come before the Court on which he serves."

[12] The decisions following and preceding *Commonwealth* recognize that arbitrators, often chosen for their knowledge of the business community in which the dispute arises, are likely to have a business relationship with a party which is not disqualifying even

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3. If the undisclosed relationship here were with a private party, failure to reveal it surely would taint the judgment and require a new trial. The fact that the party here is a sovereign state cannot excuse non-disclosure. Indeed compliance with Canon 33 of Canons of Judicial Ethics quoted above, and Canon 26 requiring a judge to "refrain from relations which normally tend to arouse suspicion that such relations warp or bias his judgment" (adopted by the Oregon Bar Association in 1952), appears to require that judges avoid relationships particularly with a party such as a sovereign state, the most frequent party before the state courts in civil as well as in criminal matters.

Possible prejudice and bias is at least as great where the judge's business relation is with a public body. A judge might very well be less entangled with a private party from whom he purchased real estate in an arms length transaction at market price in the competition of the market than from a public body, as here, on the basis of one appraisal and on most favorable terms of payment which permitted promptly mortgaging the property for substantially more than the purchase price.

4. Oregon is one of the states which provides by statute that the filing of an affidavit of prejudice in good

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if substantial providing it is disclosed. *Cook Industries* v. *Iliah*, 449 F.2d 109 (C.A. 2); *South Eastern Coal* v. *Consolidated Coal*, 434 F.2d 792 (C.A. 6); *Garfield Co.* v. *Weiss*, 432 F.2d 852 (C.A. 2); *Rogers* v. *Schering Corp.*, 165 F.Supp. 295 aff. on District Court's opinion 271 F.2d 266 (C.A. 3); *Baar & Beards, Inc.* v. *Oleg Cassini, Inc.*, 37 A.D. 2d 106, 322 N.Y. Supp. 2d 462; *Cross Properties Inc.* v. *Gimbel Bros.*, 15 A.D. 2d 913, 225 N.Y. Supp. 2d 1014, aff. 12 N.Y. 2d 806, 236 N.Y. Supp. 2d 61; *Milliken Woolens, Inc.* v. *Weber Knit Sportswear Inc.*, 11 A.D. 2d 166, 202, 43, aff. 9 N.Y. 2d 868, 216 N.Y. Supp. 2d 696.

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faith "is sufficient on its face to recuse a judge." *State ex rel. Lovell* v. *Weiss,* 250 Or. 252, 430 P.2d 357, 359 (1967); cf. *Disqualification of Judges for Prejudice or Bias,* 48 Or. L.R. 311-410 (1969). It is clear that Petitioners were deprived of their absolute right under Oregon law to recuse the Trial Judge for his business relationship with the Respondent. The instant law suit by the State of Oregon against Petitioners, a Delaware construction company and a Connecticut insurance company as surety, involves grave contentions that state officials withheld from Petitioners important engineering data on the difficult conditions to be met on the project. In these circumstances it is most unlikely that the Trial Judge, without a jury, would have been acceptable to Petitioners despite his business relationship with the Respondent. As a minimum, Petitioners, by disclosure of the relationship, should have been granted the opportunity to consider the problem and decide whether to request the Judge to recuse himself (App. pp. 8a-11a).

The Oregon Legislature has not spoken expressly on disqualification for "substantial interest" or for being "connected with any party", as has the Congress in 28 U.S.C. § 455. ORS. 14.120 requires mandatory disqualification (in addition to other reasons irrelevant here) if the Judge is party to, or directly interested in the action, suit or proceeding (ORS. 14.210(1)(a)) or if he is related to any party or attorney for any party or an office associate of any such attorney by consanguinity or affinity within the third degree (ORS. 14.210 (1)(c)). It may well be that the failure of the Legislature to provide expressly for mandatory disqualification or at least for disqualification within the discretion of the Trial Judge in the case of a substantial

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business relationship, or as the Federal Statutes express it, of being "so related to or connected with any party or his attorney", would render the statute unconstitutional if construed as not requiring a fair trial before a fair and disinterested judge.

Assuming without conceding that the issue of being connected with, or having a relationship with, a party to a suit was intended to be covered by the disqualification for prejudice statute (ORS. 14.250), the failure of that statute to require notice and disclosure raises such failure to constitutional magnitude. In any event, Oregon's failure to enact clear statutory pronouncements on disqualification of a trial judge connected to one of the parties by a substantial business relationship underscores the need for a definitive and authoritative pronouncement by this Court on this procedural due process issue.

II. An Authoritative Pronouncement by This Court on the Propriety of Business Relationship Between a Judge and a Party Before Him Is Urgently Needed.

This Court should review this question in this case because the bench and bar sorely need the guidance and direction of this Court on this question. It is true that in recent years Committees of Congress have considered additional legislative standards for non-judicial conduct of judges, including business activities;[13] the Judicial Conference of the United States has adopted

[13] Hearings before Subcommittee on Separation of Powers of Committee on Judiciary of United States Senate on Non-judicial Activities of Supreme Court Justices and Other Federal Judges, 91st Cong. 1st Sess.; Final Report by Special Subcommittee of House Judiciary Committee on H. Res. 920 on Associate Justice William O. Douglas, 91st Cong. 2nd Sess.

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and modified rules for Federal Judges in this area;[14] the American Bar Association has adopted the new Code of Judicial Conduct;[15] and there has been much discussion of the problem.[16]

Apart from *Commonwealth, supra,* however, there is little judicial authority on disqualification of a judge because of a substantial business relationship with a party involved in a case before his Court. The case involving a judge's financial interest in the case before him, *Tumey* v. *Ohio, supra,* or relationship of a judge with a party or counsel of a party, *Carr* v. *Fife,* 156 U.S. 494; *Texaco Inc.* v. *Chandler,* 354 F.2d 655, cert. denied 383 U.S. 936, do not supply an easily applicable standard of conduct for cases of a separate business relationship between a judge and a party. The extra-judicial discussions of the subject are diffuse and inconsistent.

Efforts to deal with this serious constitutional problem by hortatory bar association standards, not readily enforced against judges, or even by judicial administrative rules as helpful guidelines are of limited effect.

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[14] Judge Robert A. Ainsworth, *Judicial Ethics—The Federal Judiciary Seeks Modern Standards of Conduct,* 45 Notre Dame Lawyer 470(1970).

[15] Canon 5 of the Code of Judicial Conduct adopted August 16, 1972.

[16] See generally Dean Acheson, *Removing the Shadow Cast on the Courts,* 55 ABAJ 919 (1969); Hastings, *Judicial Ethics as it Relates to Participation in Money Making Activities,* Univ. of Chicago Law School Conference on Judicial Ethics (1964); Judge Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics,* 35 Law & Contemporary Problems 3 (1970); McKay, *The Judiciary and Non-Judicial Activities,* 35 L&CP 9; Frank, *Disqualification of Judges; In Support of the Bayh Bill,* 35 L&CP 43.

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The binding effect of an authoritative decision by this Court, based on a strong factual situation such as presented here, would be of inestimable value. No direct guidance has been given in the decisions of this Court. Since it is a question of constitutional due process, a decision by this Court is most appropriate.

A statement of applicable rules by this Court on this case would immediately become available to all federal and state judges and to the bar generally and would serve effectively both as a guide to correct conduct and an inhibition of relationships threatening that independence of the judiciary which in the last analysis must rest upon popular acceptance of its impartiality. That impartiality and independence will best be supported by an authoritative decision of this Court enforcing impartiality.[17]

For all of the reasons stated it is urged that this question be reviewed in this case involving a clear factual situation.

III. Petitioners Were Denied Due Process of Law by the Trial Court's Declaration in Its Opinion That Petitioners Are Responsible for All Delays of U.S. Steel Corporation, Builder of the Superstructure of the Bridge.

The complaint, and the first and second amended complaints, joined U. S. Steel Corporation as a party defendant and alleged that U. S. Steel was asserting that Petitioners were responsible under their contract for damage caused to U. S. Steel by delay in the completion of the foundations on which Petitioner DeLong

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[17] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) is another example of a situation in which pending federal and state legislation to deal with an urgent problem, providing counsel for indigent defendants, made no headway until this Court defined the constitutional principle involved. Legislation immediately followed. Criminal Justice Act of 1964 as amended, 18 U.S.C. 3006A.

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had worked. The complaint further prayed that the Court should declare that any such delay and damage was the fault of Petitioner DeLong. The Circuit Court, however, sustained DeLong's demurrer and dismissed U. S. Steel Corporation as a defendant on the ground that the issues involving U. S. Steel Corporation were separate and different issues not properly included in this lawsuit. The third amended complaint eliminated U. S. Steel as a defendant. It alleged only that U. S. Steel Corporation was asserting a claim for damages due to delay against Plaintiff-Respondent and requested a declaration that any such delay or damages were the fault of Defendant-Petitioner DeLong.

On August 30, 1967, U. S. Steel commenced an action against defendants here in the Circuit Court for Multnomah County, Oregon, asserting defendants' liability for any delay caused by them to U. S. Steel's construction of the superstructure. It simultaneously filed a separate suit against Respondent State.

Although U. S. Steel as a defendant and issues involving it were eliminated from this case and are asserted in separate actions commenced in 1967, untried and still pending, the Trial Court nevertheless in its opinion in this action dated January 31, 1969, states (App. 7a):

> "It is evident from the foregoing that any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defendant and the Court so declares".

Thus, the Trial Court in this case declared rights and liabilities of defendant-Petitioners on an issue previously eliminated from this case, not tried in this case,

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and awaiting trial in a separate case. Such a declaration by the Trial Court denies defendant-Petitioners their day in court and deprives them of due process of law.[18]

For this reason alone the judgment below denies defendant-Petitioners a fair trial, should be reversed, and a new trial ordered.

IV. The Trial Court's Ruling Discrediting Defendants' Testimony in Whole or in Part, Deprives Petitioners of Due Process of Law.

Both appellate courts below ignored Defendant-Petitioners' contention that the Trial Court erred grievously, and denied Defendants due process of law, by including in its letter opinion, and as an introduction to its findings in favor of Plaintiff and against Defendants, a ruling that Defendants' evidence should be viewed with caution; in other words, that Defendants' testimony was untrustworthy. The ultimate impact of this ruling, inasmuch as the opinion in no way retreats from its extreme meaning that the Trial Court wholly discredited Defendant's evidence, is wholly to destroy Defendants' case. In the face of the Trial Court's factual reference in its opinion, the Defendant-Petitioners are convinced that the Trial Court wholly ignored what, absent this ruling, would have been Defendants' conclusive evidence.

The Trial Court stated (App. p. 5a):

> "... Defendant had potential witnesses under their control, for instance Colonel DeLong, that did not appear during the trial. This in face of

[18] It is to be noted that U.S. Steel is now asserting in its separate action that the Trial Court's declaration in this case constitutes collateral estoppel against Petitioners in that separate action.

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> the general rule that if weaker and less satisfactory evidence is offered when it appears that more satisfactory evidence was in the power of the party to produce, the evidence should be viewed with caution".

The Trial Court did not specify any other "potential witnesses" except the witness named; nor does the Record give any indication of any such witness. Instead, the Record clearly shows that every witness called by Plaintiff-Respondent who was under Defendants' control, did appear. In fact, the witness named by the Trial Court, Colonel DeLong, was a witness at the trial. Because of his contemplated absence in Vietnam, during the trial, in connection with the war, a trial deposition was taken in pretrial proceedings by stipulation of the parties. His testimony consisted both of direct and of cross-examination. At the point in the trial when Defendants determined that this witness' testimony would be useful in rebuttal, and the witness could not be present, his deposition was offered in evidence. After ruling on all of the objections made during the deposition by the parties, the Trial Court admitted the deposition in evidence.

The action of the Trial Court in admitting this deposition was wholly in accordance with the pretrial stipulation of the parties, as the Court so found, and in accordance with Oregon Statutes, Sec. 44.010, which defines a witness as, "a person whose declaration is received as evidence to any purpose, whether made on oral examination, by deposition, or by affidavit" (App. p. 52a).

It is fair to add in this brief recital that it may be fairly inferred that the entire decision of the Trial

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Court rested on this one ambiguous and improper ruling, discrediting Defendants' evidence, a ruling obviously in complete conflict with the trial ruling admitting the evidence of Witness DeLong. One example will suffice. In its opinion the Court finds that scour, i.e., erosion, in the Columbia River in September and October, 1963, was the responsibility of the Defendant contractor (App. p. 5a). There is no evidence in the Record to support this finding. On the contrary, there is Plaintiff's contemporaneous written "Order for Extra Work", dated October 17, 1963 (Exhibit H in evidence, App. inserted after p. 55a), which states expressly that, "no erosion work included in the contract", i.e., a written admission by Plaintiff that that erosion or scour was not the responsibility of the contractor, DeLong Corporation. Despite this documentary evidence and admission, the Trial Court erroneously found DeLong responsible for the erosion.

Oregon statutes provide for a jury instruction by the court, "on all proper occasions" that less satisfactory evidence should be viewed with distrust if more satisfactory evidence is within the power of the party (§ 17.250, App. p. 53a) and that there is a disputable presumption that higher evidence would be adverse from inferior evidence being produced (§ 41.260, App. p. 51a). But the Supreme Court of Oregon has authoritatively ruled that to give such an instruction or to apply such a presumption in an inappropriate factual situation is reversible error. *State* v. *Thomson*, 203 Or. 1, 278 P. 2d 142 (1954); *Godvig* v. *Lopez*, 195 Or. 301, 202 P. 2d 935 (1949) *Fitze* v. *American-Hawaiian S. S. Co.*, 167 Or. 439, 117 P. 2d 825.

The Supreme Court of Oregon applies these statutory provisions in the same manner as courts generally

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apply the ...lge-made rule that in appropriate cases the inferei ...'s applicable, but a misapplication is reversible error. *Wynn* v. *U.S.*, 397 F. 2d 621 (CA DC 1967); *Jenkins* v. *Bieschek*, 333 F.2d 421 (CA 8); *Boyer* v. *The Merry Queen*, 202 F.2d 575 (CA 3 (1953)); *Bean* v. *Riddle* (Mo. Sup. Ct.) 423 SW 2d 709 (1968); *Critzer* v. *Shegogue*, 236 A.2d 411, 204 A.2d 180 (1964); *Ala.* v. *Larisey*, 269 Ala. 203, 112 So. 2d 203 (1954); McCormick, *Evidence*, § 272 (2nd Ed. 1972); Wigmore, *Evidence*, §§ 285-292 (3rd Ed. 1940).

Critzer and *Bean, supra*, are particularly apposite here, because they point out that where, as here, the witness has given a deposition, his evidence is available to either party and it is reversible error to draw the unfavorable inference against the evidence produced by one party who does not call the witness. *A fortiori*, in this case, in which the deposition of Colonel DeLong was placed in evidence on stipulation of the parties, there was no possible basis whatever for the Trial Court to distrust, or view with caution, Defendants' evidence because Defendants did not call Colonel DeLong as a witness in person to repeat on the witness stand what he stated in the deposition introduced in evidence.[19]

It is submitted that this denigration of all of Defendants' evidence by the trier of the facts was not

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[19] It is noted that not only did the parties stipulate that the deposition testimony of Witness DeLong could be offered at trial, but it was specifically agreed by Counsel at the outset of the deposition as follows: ". . . You should ask all questions that you would ask at the regular trial of this case, and likewise that the opposite party should ask questions at cross-examination such as he would ask at the time of trial, so that the deposition will be so far as we can make it a complete reproduction of the testimony of this witness" (Exh. T 15 pp. 8-9).

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only plainly reversible error but was so grievous as to constitute denial of due process of law, requiring reversal and a new trial. The error is so gross that consciously or unconsciously, it must, or at least may have been, triggered by prejudice, establishing (though by hindsight) that an affidavit of prejudice because of the substantial business relationship with the thus favored party—had it been disclosed—would indeed have been based on reasonable apprehension.

V. Plaintiff's Use of Fraudulent Exhibits Deprived Defendants of Due Process of Law.

The sole basis for claims by Plaintiff-Respondent Oregon, is the alleged responsibility of Petitioner for the defective seal of concrete poured at Pier 169, one of the twin major piers emplaced in the river bed to support the Astoria Bridge over the Columbia River. The contract between the parties provided (1) that the concrete should be poured under the immediate supervision of the Oregon State Highway Commission Engineer; (2) that the concrete deposited in water should be Class A with 10% excess cement and that still water should be maintained at the point of deposit with watertight cofferdams; and (3) that the proportions by weight of cement, aggregates (sand and gravel), water and air entraining agent necessary to conform to these requirements, should be determined by the Commission's laboratory tests and the Commission's Engineer should have complete control of proportioning the concrete materials.

The concrete on Pier 169 proved defective in that the concrete did segregate and bulk and did not provide proper seals. The Plaintiff contended the Defendant was at fault and breached its contract by failing to

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replace the defective seals. Defendant countered this claim with proof that the Plaintiff had prescribed the wrong concrete mixture, and that this factor, together with the impossibility of maintaining still water at the site due to erosion of the river bottom, was responsible for the defective seals. Both of these factors were the responsibility of the State and not of DeLong. Defendant added proof that Plaintiff's engineers had contemplated this erosion but had neither designed for it nor notified Defendant.

The Trial Court rejected the Defendants' contention and purportedly accepted the testimony of the Plaintiff's experts that the cause of the poor concrete was the slow rate of pour, failure to use more than one tremie pipe during the pour, and failure to maintain a tremie pipe in such condition as to exclude such excess water during the pour (App. p. 5a).

The Trial Court's conclusion, insofar as it was based on evidence, could only have been based on Exhibit 113 (App. p. 55a) in accepting Plaintiff's view, and on Exhibit 488 (App. inserted after p. 55a) in rejecting Defendant's proof. These exhibits were both offered as contemporaneous records kept in the ordinary course of business, but in fact, containing entries not made in the regular course of business or at the time of the original entries, but subsequently, *after* the defective seal on Pier 169 was poured and Plaintiff was considering termination of the contract. This material added to these exhibits *post litem motam,* is the only evidence which could support the conclusion that the defective seal on Pier 169 was Defendant's responsibility and not Plaintiff's responsibility.

(a) *Concrete Mix and Exhibit 488*—Defendant introduced into evidence the Highway Commission's lab-

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oratory reports (Exh. A-15, App. inserted after p. 55a) on the composition of the concrete, made pursuant to the contract, which disclosed that the concrete mix being prepared and used under control of Plaintiff, was by ratio of weight, cement 94 lbs. to sand 177.5 lbs. to gravel 378.3 lbs., which produced concrete which the Commission's own expert, Gerwick, testified contained too much gravel for satisfactory concrete. But the expert witnesses all agreed that the Highway Commission should have ordered a mix of the approximate ratio of 1 to 1.8 to 2.7; whereas, the mix actually used as shown by the laboratory reports showed a ratio of 1:1.8:4.

The Plaintiff attempted to refute this unimpeachable evidence concerning the faulty concrete mix, which was Plaintiff's responsibility, by introducing at the end of the trial (although not produced during pretrial discovery) the "Columbia River Bridge Concrete Pour Record Sheets" (Exh. 488, App. inserted after p. 55a), which recorded the number of bags of concrete, each containing 1½ yards of material, filled and delivered to barges for transport to the river site four miles away, during each shift. These sheets, signed by the Government inspector of the number of bags filled and delivered for transport, did not originally contain a recitation of the concrete mix but on each sheet there was added, in different handwriting, figures indicating a mix of ingredients to make acceptable cement. This false evidence was the only basis in the Record for rejecting Defendants' contention that the concrete seal on Pier 169 failed because of a defective mixture of materials. Again it is pointed out that the responsibility for this mix was solely Plaintiff's.

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(b) *Scour and Exhibit 113*—Furthermore, the situation was aggravated by the inability to obtain still water into which to pour the concrete. The concrete seal was to have been poured below the river bottom which was itself 48 feet below the surface, in still water and within a steel cofferdam emplaced by Defendant. But because of erosion and scour of the river bottom by the swiftly flowing current, the bottom fell away to almost twice the depth of 48 feet below the surface, a condition contemplated by Plaintiff but unreported and ignored in design. Before the concrete pour of the seals began, Oregon, in an effort to control the excessive erosion, dumped a hill of rock around the cofferdam walls. The physical result, unknown at the time, was that plates constituting the cofferdam were wedged apart as much as one-half inch, and river water entered the space so that the pour was being made in moving water rather than in still water as required by the contract, and this contributed to the defective seals.

Plaintiff sought to shift its responsibility for the defective seals to the Defendants and to escape responsibility by contending that the Defendant's pipe through which the concrete was poured, was inadequate and defective. For this contention, Plaintiff sought to rely chiefly on an entry in a "Resident Engineer's Diary for the period December 11 to December 21st, 1963" (Exhibit 113, App. p. 55a) covering part of the period of the concrete pour from December 4 through December 17, 1963.[20] After the regular entry for De-

[20] Exhibit 113 is one of a series of 36 exhibits, similar diaries introduced into evidence together at the beginning of the trial, but without reference to the entry relied upon subsequently in this factual dispute.

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cember 15th on page 19 of the diary, appears an additional entry dated January 10, 1964, three weeks later after termination of Defendant's attempt to pour the concrete seal and after Plaintiff had decided to blame Defendant for its failure. The entry purports to recount that between December 12 and December 15th, the engineer signing this tardy entry, "noticed water gushing between the flange joints of the tremie pipe". This after-thought entry is by judicial admission (R. 8547-9) the only basis in the Record for the Court's conclusion that the cause of the poor concrete was Defendant's fault.

The Defendant-Petitioners submit that the receipt of these altered exhibits in evidence as contemporary records made in the ordinary course of business, although including items apparently subsequently entered to support Plaintiff-Respondent's position in this litigation, was a deception and fraud on the Court which deprived Defendant-Petitioners of a fair trial and due process of law. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944).

CONCLUSION

Petitioners have been refused any hearing below on the substantial federal question that their Fourteenth amendment due process rights have been violated by being adjudged liable for millions of dollars to Respondent by a trial judge with a recently discovered, undisclosed, substantial, contemporaneous and profitable business relationship with Respondent. The indisputable facts appear on title documents of record consisting of a contract of sale and deed of realty between the trial judge and Respondent and a mortgage recorded on the real property. An authoritative deci-

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sion of this Court is required both to protect Petitioners' constitutional rights and also in the public interest to provide guidance, not now available in this Court's decisions, for federal and state judges in respect of undisclosed business dealings with parties in litigation before the courts.

The other errors of the trial Court discussed herein emphasize the denial of due process of law suffered by Petitioners.

For the foregoing reasons it is prayed that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BERT B. RAND,
HANS A. NATHAN and
JAMES Q. SMITH,
1730 K Street, Suite 308,
Washington, D. C. 20006

GEORGE W. MEAD
Public Service Building
Portland, Oregon 97204

ARDEN E. SHENKER
801 Standard Plaza
Portland, Oregon 97204

Counsel for Petitioners

February 6, 1973

APPENDIX

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APPENDIX

STATE OF OREGON
SUPREME COURT
SALEM 97310

November 8, 1972

George W. Mead
Bert B. Rand
Norman E. Bayles
1211 Public Service Building
Portland, Oregon 97204

Arden E. Shenker
Farrand M. Livingston
801 Standard Plaza
Portland, Oregon 97204

Re: State of Oregon v. DeLong Corporation and Travelers Indemnity Company

Gentlemen:

I am directed to inform you that the court has today denied appellants' petition for review in the above matter.

Very truly yours,

/s/ MILDRED OLDENBURG
Mildred Oldenburg
Deputy Administrator

MO:bn

cc: Lee Johnson, Attorney General
John W. Osburn, Solicitor General
State Office Building
Salem 97310

Alan H. Johansen
1930 Georgia-Pacific Building
Portland, Oregon 97204

George A. Rhoten
300 Pioneer Trust Building
Salem, Oregon 97301

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STATE OF OREGON SUPREME COURT

LOREN D. HICKS
State Court Administrator

December 12, 1972

Mr. George W. Mead
Attorney at Law
1211 Public Service Building
Portland, Oregon 97204

Mr. Arden E. Shenker
Attorney at Law
801 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

In re: State v. Delong Corporation and The Travelers Indemnity Co.

Gentlemen:

The Supreme Court has today denied your petition for reconsideration of petition for review and supplemental petition for reconsideration.

Very truly yours,

/s/ J. DAVID GERNANT
J. David Gernant
Legal Counsel

JDG:mr

cc: Mr. Lee Johnson, Attorney General
Mr. John W. Osburn, Solicitor General
Mr. Alan H. Johansen, Attorney at Law
Mr. George A. Rhoten, Attorney at Law

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CIRCUIT COURT OF THE STATE OF OREGON
THIRD JUDICIAL DISTRICT - MARION COUNTY
SALEM, OREGON

IN CHAMBERS
GEORGE A. JONES, JUDGE

January 31, 1969

G. E. Rohde
Chief Counsel
Oregon State Highway Dept.
State of Oregon
Salem, Oregon

George A. Rhoten
Attorney at Law
310 Pioneer Trust Building
Salem, Oregon

Bert B. Rand
Attorney at Law
Suite 308, Riddell Bldg.
1730 K Street N.W.
Washington, D.C.

George W. Mead
Attorney at Law
1211 Public Service Building
Portland, Oregon

Lamar Tooze
Attorney at Law
801 Standard Plaza
Portland, Oregon

Re: State of Oregon v. DeLong Corporation and Travelers Indemnity Company, #59323

Gentlemen:

This matter came on for trial before the Court, without a jury, testimony was taken, exhibits offered and received,

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and the matter having been under advisement, the Court hereby makes the following findings:

Plaintiff and Defendant, DeLong, entered into a written contract for the construction of the substructure of a bridge crossing the Columbia River at Astoria, Oregon; Defendant Travelers Indemnity Company is the surety as required by said contract.

The Columbia River is one of the nations large rivers and the bridge was to be constructed across its estuary. The building of the substructure was subject to the problems of transversing several miles underwater, in a swift current, and complicated further by the ebb and flow of the tide. This project required vision and vigor on the part of all participants.

In April, 1964, Plaintiff terminated Defendant's contract basically for the failure of Defendant to remove and replace the bad concrete seal at Pier 169 and to prosecute with vigor the balance of the work at hand, the Court hereby finds that said cancellation was valid and proper.

The Plaintiff re-advertised and re-let the contract and the substructure work was subsequently completed by another contractor, to the Plaintiff's damage in the amount of $2,464,810.77, in the principal amount. This to draw interest from the respective dates expended by the Plaintiff, as per Exhibit "E" attached to the Fifth Amended Complaint.

Defendant contends that plans and specifications, particularly regarding sub surface information, were false and fraudlent and that they were wrongfully induced to enter into the contract because of said fraudlent misrepresentation. The Court rejects Defendant's claim in this regard, in that Defendant's employees had all the sub surface information that was available to the Plaintiff a considerable amount of time prior to beginning the work, further the Court finds that said sub surface information furnished on the plans was a reasonable representation of the difficulties expected to be encountered beneath the surface as construction progressed.

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Further, it appears to the Court that the extensive testimony and much ado made, regarding sub surface conditions was a make-weight argument by the Defendant in this case in order to divert attention from the real problem that led to the termination of the contract; that is, the final responsibility for the pouring of the bad concrete seals at Pier 169, particularly in light of the fact that all the piling necessary for the completion of this project had been driven with no more difficulty, than should have been anticipated while driving piling in the estuary of this great river.

The Court is aware of the death of Defendant's Superintendent Bauer but Defendant had potential witnesses under his control, for instance Colonel DeLong, that did not appear during the trial. This in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution.

Defendant makes much of the scour problem which occurred at Pier 169 and the subsequent events relating thereto, although the protection of the cofferdams at Pier 169, under the contract, was basically the responsibility of the Defendant. Plaintiff, for reasons of its own, undertook to abate this scour condition and did stabilize the bottom of the river by use of fascines and large quantities of rock. This necessitated the re-driving of a cofferdam and adjustment of the lower level of the concrete seals before pouring could commence. Defendant attempted to relate the scour condition of the ultimate failure of the concrete poured into the two cofferdams constructed at Pier 169, this concrete was to be the seals atop the piling driven at this site, which in turn formed the base for one of the main piers supporting the span across the main river channel.

The Court rejects the Defendant's theory and accepts the testimony of Plaintiff's experts, relating to the cause of the poor concrete at Pier 169, the basic causes being a slow rate of pour, the failure to use more than one tremie

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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission,

Plaintiff-Respondent,

v.

DELONG CORPORATION AND THE TRAVELERS INDEMNITY COMPANY

Defendants-Appellants.

Affidavit of George W. Mead

COUNTY OF
STATE OF OREGON } ss:

GEORGE W. MEAD, being duly sworn, deposes and says:

1. My name is George W. Mead and I am a member of the Bar of this Court engaged in the practice of law at 1211 Public Service Building, Portland, Oregon.

2. I am and have been chief counsel for Defendant (Petioner herein) DeLong Corporation in the instant controversy since prior to the filing of this case by the State of Oregon in the Circuit Court for Marion County.

3. I have analyzed the documentation relating to the business dealings between Plaintiff State of Oregon and the Trial Judge, the Honorable George A. Jones, as assembled by attorney-investigator John Cye Cheasty, and the statutes, case law and literature relating to the disqualification of judges.

4. In the light of the documentation aforesaid and the law as pertaining thereto, I have determined, after consultation with representatives of the client and with associate counsel, that if the facts reflected in all documentation aforesaid had been disclosed to me by the Trial Judge prior

to trial, I would have filed an affidavit of prejudice seeking disqualification of the Trial Judge herein.

5. Leave of this Court is respectfully requested to constitute the within affidavit an affidavit of prejudice within he purview of ORS.14.250, *et seq.*, incorporating therein by reference the facts recited in the affidavit of John Cye Cheasty dated the 21st day of November, 1972, and attached to the Supplemental Petition for Reconsideration of the Petition for Review.

6. It is prayed further that the Court permit this affidavit to be considered filed *nunc pro tunc*, as of the time of the assignment of this case to the Honorable George A. Jones for trial, in September of 1967.

7. This affidavit is made in good faith and not for the purpose of delay or any other purpose, but solely on the grounds that I believe that the Honorable George A. Jones has been at the time of trial herein, and would in the future be, prejudiced in favor of Plaintiff State of Oregon and against the interests of my cilent, DeLong Corporation.

8. I further pray that in the interest of justice this Court order that a new trial be had before a Trial Judge other than the Honorable George A. Jones.

FURTHER AFFIANT SAYETH NOT.

/s/ GEORGE W. MEAD
George W. Mead

SUBSCRIBED and sworn to before me this 30th day of November, 1972.

MARY MCHENRY
Notary Public for Oregon
My Commission Expires:
February 9, 1973

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission,

Plaintiff-Respondent,

v.

DELONG CORPORATION AND THE TRAVELERS INDEMNITY COMPANY,

Defendants-Appellants.

Affidavit of Arden E. Shenker

COUNTY OF
STATE OF OREGON } ss.

ARDEN E. SHENKER, being duly sworn, deposes and says:

1. My name is Arden E. Shenker and I am a member of the Bar of this Court engaged in the practice of law at 802 Standard Plaza, Portland, Oregon.

2. I am now chief counsel in the instant controversy for Defendant The Travelers Indemnity Company, having succeeded the late General Lamar Tooze in this capacity.

3. I have analyzed the documentation relating to the business dealings between the Plaintiff State of Oregon and the Trial Judge, the Honorable George A. Jones, as assembled by attorney-investigator John Cye Cheasty, and I have also researched and analyzed the statutes, case law and literature relating to disqualification of judges. While I am unable to state with certainty the position of the late General Lamar Tooze had the facts reflected in the affidavit of John Cye Cheasty been disclosed to him by the Trial Court prior to the trial herein, I can state without equivocation that I would have recommended to him that an affidavit of prejudice be filed seeking disqualification of the Trial Judge.

4. Leave of this Court is respectfully requested to constitute the within affidavit of prejudice within the purview of ORS. 14.250, *et seq.*, incorporating therein by reference the facts recited in the affidavit of John Cye Cheasty dated the 21st day of November, 1972 and attached to the Supplemental Petition for Reconsideration of the Petition for Review.

5. It is prayed further that the Court permit this affidavit to be considered filed *nunc pro tunc,* as of the time of the assignment of this case to the Honorable George A. Jones for trial, in September of 1967.

6. This affidavit is made in good faith and not for the purpose of delay or any other purpose, but solely on the grounds that I believe that the Honorable George A. Jones has been at the time of trial herein, and would in the future be, prejudiced in favor of Plaintiff State of Oregon and against the interests of my client, The Travelers Indemnity Company.

7. I further pray that in the interest of justice this Court order that a new trial be had before a Trial Judge other than the Honorable George A. Jones.

FURTHER AFFIANT SAYETH NOT.

/s/ ARDEN E. SHENKER

SUBSCRIBED and sworn to before me this 30th day of November, 1972.

Notary Public for Oregon
My Commission Expires:
July 23, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission,

Plaintiff-Respondent,

v.

DELONG CORPORATION AND THE TRAVELERS INDEMNITY COMPANY,

Defendants-Appellants.

Affidavit of John Cye Cheasty

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss.

JOHN CYE CHEASTY, being duly sworn deposes and says:

1. My name is John Cye Cheasty and I reside at 1795 Popham Avenue, New York, New York. I am an attorney-investigator having previously been employed as a Special Agent by the United States Internal Revenue Service and thereafter having served in, and having retired from, the United States Navy with the rank of Commander. I have investigative experience for forty-two (42) years and have been a member of the Bar of the State of New York since 1933.

2. During the year of 1972, I was employed by the law firm of Trammell, Rand, Nathan & Bayles of 1730 K Street, N.W., Washington, D.C. to locate certain witnesses whose addresses were unknown and who last resided in the State of Oregon, to investigate the genuineness of certain documents and to do other factual research in connection with certain issues relating to concrete mix, involving a controversy then pending in the Oregon Courts between the State of Oregon Highway Commission and DeLong Corporation.

3. In the course of my investigation, I traveled to Oregon and spent several weeks interviewing persons in connection with this factual investigation relating to the De-

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Long controversy. During the month of May, I became aware of rumors to the effect that the trial judge in the DeLong-Oregon controversy had, at or about the time of the trial, received a loan of over one-half million dollars on some land in Oregon which formerly had been owned by the State.

4. This information was reported to Counsel employing me. I was instructed to make a discreet check of the records to see what they reflected and to report my findings. I did as instructed and found that as of 5 July 1967 Judge Jones was a one-third partner in Green Villa Farms. This partnership purchased land for $175,000.00 from the State of Oregon known as Colony Villa Farms or Colony Ranch, which land was adjacent to land owned by Green Villa Farms. On 5 July 1967, there was recorded a mortgage securing a loan of $700,000.00 granted to the partnership by Prudential Insurance Company of America. The mortgage covered all farm lands in which Judge Jones then had an interest. (Exhibit A-1 attached.)

On the same date, 5 July 1967, the State of Oregon granted a deed to Colony Farm to the partnership. This was to complete a Contract of Sale of said property which provded for a transfer of title when the terms of sale were complied with. This Contract of Sale was recorded as of 3 October 1966. (See Exhibits A-2 and A-3 attached.)

Another mortgage on this farm land had been recorded in favor of Prudential on or about 17 May 1971 in the sum of $345,000.00 to cover another loan to the partnership in like amount. (Exhibit A-4 attached.) The total Prudential mortgages amounted to $1,045,000.00 as of 17 May 1971.

Another mortgage of $54,000.00 in favor of Prudential recorded 11 August 1970 does not concern itself with the Colony Farm and is not included in the total of $1,045,000.00.

All of the above information was found by me in the records of Polk County, Dallas, Oregon.

5. I examined the minute book of the Board of Control of the State of Oregon and I found and copied the following two entries:

Dec. 15, 1964, p. 68

"Oregon State Correctional Institution
Colony Farm Further Considered.

A request originating with Judge Jones and Mr. Asa Lewelling to purchase the Colony Ranch was presented to the Board for its consideration. The group indicated that if immediate sale was not feasible, they would be willing to rent the land at $30.00 per acre, until such time as title could be cleared and the property advertised for sale. The Board indicated that they would prefer to clear title to the land prior to advertising the property for sale due to the higher expected return once the title question is resolved. The Board asked that a letter be sent to Judge Jones indicating the Board's decision and inviting his group to transmit a formal rental offer. If a higher offer is not secured, the secretary was authorized to rent the property at the $30.00 figure, if a firm offer is extended, the secretary was again instructed to advertise the property for sale as soon as the title had cleared."

The second entry is found on page 5 of the minutes of the meeting of the Board of Control for 1 February 1966:

"Oregon State Board of Control
Oregon State Correctional Institution.

Acceptance of Offer for Sale of Colony Farm.

The Board considered the offer made by the Green Villa Farms of Salem for the purchase of Colony Farm. Noting that the Green Villa Farms offer met

the minimum terms and price required by the Board of Control, a sale price of $175,000.00 on a contract sale with a down payment of $25,000.00 and the balance payable over a 20 year period at 5½ percent interest, the Board instructed the secretary to develop the necessary documents to complete the sale of this property. The offer from Green Villa Farms was the only acceptable bid received on this property."

6. I examined the records relating to the trade name of Green Villa Farm and found that there was filed, under date of 1 July 1964, in the County Clerk's Office for Polk County, Oregon, a notice of doing business under the assumed trade name of Green Villa Farms. The persons named in the filing were: Asa L. Lewelling, C. Parker Gies, George A. Jones, and David F. Kennedy, Jr.

On 1 February 1965, this was amended to show the following changes: Asa L. Lewelling, George A. Jones, and David F. Kennedy, Jr., Mr. Gies having died late in 1964.

7. Further inquiry with regard to the Colony Farm property showed that under date of 29 July 1965, an appraisal of this property was made for the State of Oregon by one Don J. Mason of Salem, Oregon. Mason is also a part-time consultant to the State of Oregon Highway Department. He appraised Colony Farm at a market value of $175,000.00 and another value of $177,250.00 if sold in separate parcels.

8. Sale to the partnership was authorized by the Board of Control on 1 February 1966, the date of the Contract of Sale for a sale price of $175,000.00, a down payment of $25,000.00 and annual installments of $12,500.00 until purchase price and interest are paid in full, with a final date of 31 December 1986. One condition of the Contract was that no deed would be granted until the full price had been paid.

9. This Contract of Sale, although dated 1 February 1966, was not recorded until 3 October 1966. What caused the delay has not yet been ascertained.

10. As of 1 July 1967, Green Villa Farms owed the State of Oregon approximately $149,000.00 in principal and interest.

11. The other parcels of land covered by the Prudential mortgage were acquired by the partnership as follows:

(a) On 10 April 1961, E. Clemens Horst Co. sold the partnership a farm. The sale price, as reflected by Federal Revenue stamps, was $256,000.00.

(b) On 31 December 1964, Leota J. Gies, the widow of original partner C. P. Gies, sold the partners certain land she had acquired, valued at $100,000.00 as reflected by the Federal Revenue stamps.

(c) In February of 1964, Ralph Williams had contracted to sell a certain parcel of land for $82,500.00, with a 10% down payment and installments of $6,500.00 per year. The deed withheld until the full purchase price was paid, which was done from the Prudential loan proceeds on 5 July 1967.

12. The State's deed to the Colony Farm property was recorded by the partners on 5 July 1967. The balance of $149,086.40 due on the purchase price plus interest, was received by the State out of the Prudential loan proceeds and credited to the State's general fund.

13. The appraisal which Don J. Mason had made in July of 1965 for the State of Oregon and on which the sale in 1966 was based, has been examined. Mason placed a gross value of $395.00 per acre on 416.3 acres and $485.00 per acre on the tillable 338 acres. This equals a fair market value for the whole land and buildings thereon of $175,-

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000.00. The sales price therefore was an average of $421.00 per acre. (See Exh. 5-A.)

14. Reliable information about the appraisal made in June or July of 1967 for Prudential Insurance Company of America tends to show that the total land was appraised at $1,200,000.00. A value of $650.00 per acre was given to all the described properties. The loan made by Prudential, as per mortgage records was $700,000.00 or 7/12 of the appraised value. The loan limit under Prudential's lending policy was 60% of appraised value at the time.

15. Despite the most diligent efforts (and partly because of the reluctance of some of the persons interviewed to provide me with the required information), I was unable to assemble the information contained in this affidavit until the end of October, or early November of 1972. Thus, for instance, when I tried to obtain the file relating to the purchase of the Colony Farm from the archives of the State of Oregon I was informed that said file was unavailable.

Due to the delays aforesaid, I could not assemble all the information and make my report aforesaid until approximately ten days prior to the date of this affidavit.

Further Affiant Sayeth Not.

/s/ John Cye Cheasty

Subscribed and sworn to before me this 21st day of November, 1972.

Louise G. Burroughs
Notary Public, D.C.
My Commission Expires:
September 30, 1976

Exhibit A-1 to Cheasty Affidavit

LOAN NO. PIC 2 159 355 BOOK 144 PAGE 116

ARIZONA-COLORADO-NEW MEXICO-OREGON-UTAH-WASHINGTON

Mortgage

THIS MORTGAGE, Made this 22nd day of June, A.D. nineteen hundred and sixty-seven, by and between ASA L. LEWELLING, GEORGE A. JONES and DAVID F. KENNEDY, JR., Partners d.b.a. GREEN VILLA FARMS and ASA L. LEWELLING and BETTY L. LEWELLING, husband and wife; GEORGE A. JONES (sometimes known as Jean M. Jones), husband and wife; and DAVID F. KENNEDY, JR. and MARGARET A. KENNEDY, husband and wife in the State of Oregon, hereinafter called "Mortgagor", and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA a corporation of the State of New Jersey, having its principal office at 745 Broad Street, Newark, New Jersey, hereinafter called "Mortgage",

WITNESSETH, that Mortgagor, for and in consideration of the sum of Seven Hundred Thousand and No/100— ($700,000.00—) Dollars, lawful money of the United States of America, to Mortgagor in hand paid by Mortgagee, the receipt of which is hereby acknowledged, and in order to secure the repayment thereof according to the promissory note hereinafter mentioned and also to secure the repayment of any further sum or sums advanced or paid by Mortgagee to or for the account of Mortgagor as herein provided, does hereby grant, bargain, sell, convey and confirm unto Mortgagee, its successors and assigns, forever, all the following described real property lying and being in the County of Polk, State of Oregon, and described as follows, to wit:

As described in the six riders attached hereto, which are identified by the signature of Asa L. Lewelling, one of the mortgagors above.

[Description of property by metes and bounds and standard mortgage clauses omitted.]

• • • • • • • • •

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17. Upon a full and complete performance of the covenants and agreements herein contained this mortgage shall be null and void, otherwise it shall be and remain in full force and effect.

In Testimony Whereof, Mortgagor has set his hand and seal the day and year first above written.

/s/ Asa L. Lewelling
Asa L. Lewelling

/s/ Betty L. Lewelling
Betty L. Lewelling

/s/ George A. Jones
George A. Jones

/s/ Jean Hanover Jones
Jean Hanover Jones

/s/ David F. Kennedy, Jr.
David F. Kennedy, Jr.

/s/ Margaret A. Kennedy
Margaret A. Kennedy

/s/ Asa L. Lewelling
Asa L. Lewelling

/s/ George A. Jones
George A. Jones

/s/ David F. Kennedy, Jr.
David F. Kennedy, Jr.
Partners d.b.a.
Green Villa Farms

BOOK 208 PAGE 31

Exhibit A-2

BARGAIN AND SALE DEED

The STATE OF OREGON acting by its Board of Control conveys to ASA L. LEWELLING, GEORGE A. JONES and DAVID F. KENNEDY, JR. a partnership doing business under the assumed name and style of GREEN VILLA FARMS, all that real property situated in Polk County, Oregon, described as:

[Description by metes and bounds omitted.]

* * * * * * * * * * *

SAVE AND EXCEPT that portion of the above described tracts of land lying within the boundaries of public roads and highways.

Dated this 23rd day of June, 1967

STATE OF OREGON
Acting by and through
the Board of Control

/s/ TOM MCCALL
Tom McCall, *Governor*

/s/ CLAY MYERS
Clay Myers,
Secretary of State

/s/ ROBERT W. STRAUB
Robert W. Straub,
State Treasurer

Attest:

/s/ CARL A. THOUGHRAND
Secretary

BOOK 208 PAGE 33

State of Oregon }
County of Marion } ss.

On this 23rd day of June, 1967, personally appeared before me the Honorable Tom McCall, Governor, the Honorable Clay H. Myers, Secretary of State and the Honorable Robert W. Straub, State Treasurer, and acknowledged the foregoing instrument to be their voluntary act.

/s/ JUANITA D. OLSON
(Seal) *Notary Public for Oregon*

My commission expires: February 29, 1968

BLEED THROUGH POOR COPY

Exhibit A-3 to Cheasty Affidavit

BOOK 202 PAGE 288

CONTRACT OF SALE

WHEREAS, for sometime last past THE STATE OF OREGON has owned a farm in Polk County, Oregon, known as COLONY FARM; that the State of Oregon acting through its Board of Control decided to put said property up for sale at a price of One Hundred Seventy-five Thousand Dollars ($175,000.00); that said property was advertised for sale at that price for cash and no bids were received. Subsequently said property was advertised for sale on terms of 29% down, balance amortized over 20 years, unpaid balance to bear interest at the rate of 5½% per annum and no bids were received on those terms, and subsequently said property was advertised at the said price of $175,000.00 on terms of $25,000.00 down, balance amortized over 20 years, interest on deferred balance at 5½% per annum and a partnership known as GREEN VILLA FARMS was the sole bidder at that price. That the said State of Oregon has accepted said bid and the said parties herewith intend to express said bid and acceptance in the form of a written contract of sale. Now, therefore,

THIS AGREEMENT made and entered into this 1st day of February, 1966, by and between THE STATE OF OREGON acting by and through its Board of Control, party of the first part hereinafter called "Seller" and Asa L. Lewelling, George A. Jones and David F. Kennedy, Jr., a partnership doing business under the assumed name and style of GREEN VILLA FARMS, party of the second part hereinafter called "Buyer",

WITNESSETH:

That in consideration of the prompt payment by Buyer unto Seller of the price hereinafter provided and of the full and timely performance by Buyer of the covenants,

terms and conditions of this contract on its part to be kept and performed, Seller hereby agrees to sell unto Buyer and Buyer hereby agrees to purchase from Seller certain real property more particularly described as follows:

[Description by metes and bounds omitted.]

* * * * * * * * * *

This sale is made upon terms and conditions as follows:

1. Price:

The price for the above described real property and which Buyer hereby covenants to pay unto Seller in the manner hereinafter provided is the sum of One Hundred Seventy-five Thousand Dollars ($175,000.00) payable as follows: Twenty-five Thousand Dollars ($25,000.00) upon execution hereof, balance in annual payments of Twelve Thousand Five Hundred Dollars ($12,500.00) each, the first of which shall be due and payable on December 31, 1966, with a like payment due on each succeeding December 31st until the entire purchase price, including both principal and interest, is paid in full, provided, however, that the entire purchase price shall be paid on or before December 31st of the twentieth year, (1986).

The unpaid balance of the purchase price shall bear interest at the rate of five and one-half per cent (5½%) per annum and each payment shall be applied first to the payment of interest then due, overplus, if any, applied to principal. Interest on all unpaid balances shall commence on the date of execution of this contract.

Buyer shall have the privilege of incrasing any annual payment or prepaying the entire balance at any time; provided that no additional payments shall be credited as

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regular future payments nor excuse Buyer from making the regular annual payments provided for in this contract.

2. Possession:

Buyer shall be entitled to possession of the premises immediately upon the execution of this contract by the parties.

3. Taxes:

All taxes levied against the above described property for the current tax year (1965-1966), paid by the Seller in the amount of Two Thousand Five Hundred Seventy-six and 70/100 Dollars ($2,576.70), shall be prorated between the Seller and Buyer as of February 1, 1966. Buyer agrees to pay when due all taxes whic are hereafter levied against the property and shall furnish Seller with copies of tax receipts for taxes paid in all subsequent years.

4. Liens:

Buyer covenants to keep the described property free from lens and encumbrances of any kind or nature whatsoever save those permitted in writing by Seller.

5. Title and Title Insurance:

Seller makes no warranties concerning the title and will not provide title insurance. However, Seller hereby covenants and agrees to sell and will convey all of its rights, title and interest in and to the described real property and appurtenances, including water rights.

6. Conveyance:

When Buyer shall have fully paid the entire purchase price with accrued interest thereon, Seller will, upon the surrender of Buyer's copy of this contract, convey unto

Buyer by bargain and sale deed the above described real property, free and clear of any encumbrances or defects in title suffered or permitted by Seller subsequent to the date hereof.

BOOK 202 PAGE 292

7. Assignment:

Buyer shall not assign this contract, his rights thereunder or in the property covered thereby without the written consent of Seller.

8. Improvements, Alterations, Repairs and Waste:

Buyer agrees that all improvements now located or which shall hereafter be placed on the premises, shall remain a part of the real property and shall not be removed at any time prior to the expiration of this contract without the written consent of the Seller. Buyer shall not commit or suffer any waste of the property, or any improvements thereon, or alterations thereof, and shall maintain the property, and all improvements thereon, and all alterations thereof, in good condition and repair. Buyer shall not otherwise make or cause to be made any improvements or alterations to the property without first obtaining the written consent of the Seller, provided, however, that Buyer may do land clearing and leveling to make the property better suited for cultivation or make more acres tillable and in doing so may cut, and bulldoze trees, shrubs and brush and fill swales, sloughs and ravines.

9. Insurance:

Buyer shall procure and keep in full force and effect during the life of this contract a policy of fire insurance with extended coverage upon the improvements on the described real property to the extent of their full insurable value, loss payable to Seller as its interest may appear at the time of said loss. Buyer shall furnish to Seller a copy of all policies of fire insurance so procured.

10. Default Provisions:

In the event that Buyer shall fail to perform any of the terms of this contract, time of payment and performance being of the essence, Seller shall, at its option, subject to the requirements of notice as herein provided, have the following rights:

(a) To foreclose this contract by strict foreclosure in equity.

(b) To declare the full unpaid balance of the purchase price immediately due and payable.

(c) To specifically enforce the terms of this contract by suit in equity.

(d) To declare this contract null and void as of the date of the breach and to retain as liquidated damages the amount of the payment theretofore made upon said premises and all improvements or fixtures placed on the premises. Under this option all of the right, title and interest of Buyer shall revert and revest

in Seller without any act of re-entry or without any other act by Seller to be performed, and Buyer agrees to peaceably surrender the premises to Seller, or in default thereof Buyer may, at the option of Seller, be treated as a tenant holding over unlawfully after the expiration of a lease and may be ousted and removed as such.

Buyer shall not be deemed in default for failure to perform any covenant or condition of this contract, other than the failure to make payments as provided for herein, until notice of said default has been given by Seller to Buyer and Buyer shall have failed to remedy said default within 30 days after the giving of the notice. Notice for this purpose shall be deemed to have been given by the deposit in the mails of a certified letter containing said notice and addressed to Asa L. Lewelling at 1001 Capitol Tower, Salem, Oregon 97301. Notice to Buyer, Asa L. Lewelling, shall constitute notice to all the Buyers.

If Buyer shall fail to make payment as herein provided and said failure shall continue for more than 10 days after the payment becomes due, Buyer shall be deemed in default and Seller shall not be obligated to give notice to Buyer of a declaration of said default.

If Seller shall bring suit or action upon this contract for damages for the breach of the contract or for recovery of possession of the described real property or for specific performance of this contract, the Seller, if the prevailing party in said suit or action, shall be entitled to such sum as its attorney's fees as the court hearing said suit or action shall adjudge to be reasonable.

11. Waiver:

Waiver by Seller of the prompt performance of any term or condition of this contract at any given time shall not be construed as a waiver of prompt and timely performance at any subsequent time and despite any prior waivers or indulgences Buyer shall at all times be held to the strict and timely performance of this contract and no notice or demand will be necessary to reinstate buyer's obligation for such strict and timely performance.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on this 22 day of February, 1966.

BOOK 202 PAGE 294

STATE OF OREGON, acting by and through the Oregon State Board of Control

/s/ MARK O. HATFIELD
Governor

(Seal)

/s/ TOM MCCALL
Secretary of State

/s/ ROBERT W. STRAUB
State Treasurer

"Seller"

GREEN VILLA FARMS,
a partnership
/s/ ASA L. LEWELLING
Asa L. Lewelling
/s/ GEORGE A. JONES
George A. Jones
/s/ DAVID F. KENNEDY, JR.
David F. Kennedy, Jr.
"Buyer"

STATE OF OREGON }
County of Marion } ss.

On this 22nd day of February, 1966, before me appeared the Honorable Mark O. Hatfield, the Honorable Tom McCall, and the Honorable Robert W. Straub, personally known to me to be the Governor, the Secretary of State and the State Treasurer, respectively, of the State of Oregon, comprising the Oregon State Board of Control, who have executed the foregoing instrument and acknowledged to me that they have executed the same freely and voluntarily in their capacity as members of the Oregon State Board of Control.

/s/ JUANITA D. OLSON
(Seal) *Notary Public for Oregon*

My commission expires: 2-29-68

STATE OF OREGON }
County of Marion } ss.

On this 22 day of February, 1966, personally appeared the above-named Asa L. Lewelling, George A. Jones and David F. Kennedy and acknowledged the foregoing instrument to be their voluntary act and deed.

/s/ ROSEMARY SIEFARTH
(Seal) *Notary Public for Oregon*

My commission expires: 1-30-68

Exhibit A-4

BOOK 17 PAGE 17

Loan No.

ARIZONA-COLORADO-IDAHO-NEW MEXICO
OREGON-UTAH-WASHINGTON

MORTGAGE

THIS MORTGAGE, Made this 17th day of May, A.D. nineteen hundred and seventy-one, by and between Asa L. Lewelling, George A. Jones and David F. Kennedy, Jr., Partners d.b.a. GREEN VILLA FARMS and Asa L. Lewelling and Betty L. Lewelling, husband and wife; George A. Jones and Jean Hanover Jones (sometimes known as Jean M. Jones), husband and wife and David F. Kennedy, Jr. and Margaret A. Kennedy, husband and wife, of the county of Polk in the State of Oregon, hereinafter called "Mortgagor", and

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

a corporation of the State of New Jersey having its principal office at 745 Broad Street, Newark, New Jersey, hereinafter called "Mortgagee",

WITNESSETH, that Mortgagee, for and in consideration of the sum of Three Hundred Forty-Five Thousand And No/100 ($345,000.00) Dollars, lawful money of the United States of America, to Mortgagor in hand paid by Mortgagee, the receipt of which is hereby acknowledged, and in order to secure the repayment thereof according to the promissory note hereinafter mentioned and also to secure the repayment of any further sum or sums advanced or paid by Mortgagee to or for the account of Mortgagor as herein provided, does hereby grant, bargain, sell, convey and confirm unto Mortgagee, its successors and assigns, forever, all the following described real property lying and being in the County of Polk, State of Oregan, and described as follows, to wit:

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As described in the seven riders attached hereto, which are identified by the signature of Asa L. Lewelling, one of the mortgagors above.

[Description and Standard Mortgage Terms Omitted]

BOOK 17 PAGE 27

IN TESTIMONY WHEREOF, Mortgagor has set his hand and seal the day and year first above written.

/s/ ASA L. LEWELLING
Asa L. Lewelling

/s/ BETTY L. LEWELLING
Betty L. Lewelling

/s/ GEORGE A. JONES
George A. Jones

/s/ JEAN HANOVER JONES
Jean Hanover Jones

By: /s/ GEORGE A. JONES
Her Attorney in Fact

/s/ DAVID F. KENNEDY, JR.
David F. Kennedy, Jr.

/s/ MARGARET A. KENNEDY
Margaret A. Kennedy

/s/ ASA L. LEWELLING
Asa L. Lewelling

/s/ GEORGE A. JONES
George A. Jones

/s/ DAVID F. KENNEDY, JR.
David F. Kennedy, Jr.

Partners D.B.A.
GREEN VILLA FARMS

Exhibit A-5 to Cheasty Affidavit

DEPARTMENT OF VETERANS' AFFAIRS

July 29, 1965

To: H. B. Woody
FROM: D. J. Mason

Pursuant to your request, I have made an appraisal of the Colony Farm located in Polk County, Oregon.

The appraisal has as its purpose the estimation of MARKET VALUE as of July 28, 1965. The property rights appraised are fee simple ownership assuming no indebtedness against the property.

As a result of my investigation and analysis described in this report which consists of six pages and three exhibits, I am of the opinion that the MARKET VALUE of the subject as of July 28, 1965, is

ONE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS
($175,000.00)

A supplemental report included consists of two pages stating estimates of value for segregated parcels of the property. In my opinion the sum of these aggregate values as of July 28, 1965, is

ONE HUNDRED SEVENTY-SEVEN THOUSAND TWO HUNDRED FIFTY DOLLARS
($177,250.00)

I certify that I have personally inspected the property and considered the factors affecting value, that I have no interest in the property, present or contemplated and that the value found is in no way affected by the fees received.

Respectfully Submitted,

/s/ D. J. MASON
D. J. Mason

DJM: cr

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission, *Plaintiff-Respondent,*

v.

DELONG CORPORATION and THE TRAVELERS INDEMNITY COMPANY, *Defendants-Appellants.*

Affidavit of Bert B. Rand

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss:

BERT B. RAND, being duly sworn, deposes and says:

1. I am a member of the Bar of the U. S. Supreme Court and a practicing attorney with offices at 1730 K Street, N.W., Washington, D. C. I was admitted to the Circuit Court for Marion County *pro hec vice* as associate counsel in the captioned case, and I am acquainted with the record in this case.

2. I believe that the Trial Court relied chiefly, if not exclusively, on Plaintiff, Oregon's, Exhibits 113 and 448 in rendering judgment for Plaintiff based on Plaintiff's allegation that it had properly terminated Defendant, DeLong's, contract because Defendant was at fault in pouring defective seals at Pier 169 of the Astoria Bridge.

3. We had serious doubts, beginning when these Exhibits 113 and 488 were introduced, as to the validity of their identification and as to their origin and identity. This applies especially to Exhibit 488, which was offered in rebuttal near the end of tral, to overcome the Plaintiff's own official laboratory reports (Defendant's Exhibit A-15), obtained by Defendant late in the proceedings.

4. After the close of the trial, my associates, investigators employed by us, and I, continued a search to ascertain any new facts concerning these exhibits and related matters. Potential witnesses not available at the trial were

sought and interviewed when found; independent consulting engineers studied and analyzed information obtained and the exhibits were submitted to an expert questioned-document examiner. Respite diligence, it was not until a few weeks ago that we decided that our investigation had brought us to a point where it could be responsibly alleged that these exhibits had been improperly offered.

5. I believe that these exhibits were admitted on the basis of incorrect testimony and that the Trial Court would not have admitted or given weight to these exhibits if the facts as to their origin and identity had been available to him.

6. Attached as Exhibits A and B, respectively, are copies of the results of document examination to date of Plaintiff's Exhibits 113 and 488, submitted in support of the foregoing statements.

FURTHER AFFIANT SAYETH NOT.

/s/ BERT B. RAND
Bert B. Rand

SUBSCRIBED and sworn to before me, this 29th day of November, 1972.

/s/ LOUISE G. BURROUGHS
Notary Public, D. C.

My Commission Expires September 30, 1975

Exhibit A to Rand Affidavit

CONFIDENTIAL INVESTIGATION REPORT

Re: Questioned Documents
File No. 2-131-W

November 22, 1972

Re: Examination of Documents

For: Trammell, Rand, Nathan & Bayles, Attorneys-at-Law, 1730 K Street, N.W., Washington, D. C. 20006

Subject: Exhibits # 113-123 (with particular reference to P. 19, Exhibit # 113) from case of:

Oregon v. DeLong Corporation, et al.

Pursuant to your request we have at various times examined and tested this document.

Enclosed is a compilation of the results as determined by the Document Examiner.

Also enclosed is a statement of the qualifications of the Document Examiner.

John T. Lynch Company

by /s/ R. E. Cahill

Report # 1

The entries in the Resident Engineer's Diaries # 28-38, Pl. Exhibits 113 to 123 inclusive, and Pool's Diary, were examined, with particular reference to page 19 of # 28, Ex. 113 by Larry P. Peterson.

The purpose of the examinations was to discover any evidence of the actual date of entries as contrasted to the date recorded (ostensible date), and evidence which might be present as to who made entries as contrasted with ostensible writers.

It was found that entry writings, particularly those signed "Larry Peterson or LLP" (as on page 19, # 28, Ex. 113) contain evidence of execution by the ostensible writer, using other entries as unquestioned examples.

With reference to the actual date when entries were made the date under the signature "Larry Peterson" at the top of page 19, # 28, Ex. 113, ending the entry for 12/15/63 begun on the previous page, "12/15/63" shows that the two figure was written over "1", probably a mistake. The pencil of the entries and signature and date equate with each other except that at the end of the entry "(APROX.)" was entered with another pencil, lighter and making lines not as wide. This is evidence of adding the quoted "(APROX.)" not at the time of making the 12/15/63 entry but at a later time.

In an effort to discover evidence of the actual time the pencil strokes were compared with other entries, such as that immediately below dated 1/10/*63*/64. It will be noted this year was changed and "LPP" initials placed alongside.

This entry is with a lighter pencil than the 12/15/63 entry but does not fully correspond to "(APROX.)" above. Entries most similar as to the pencil, were found on many pages of all of these diaries, signed "M.H. 4/9/64". This includes Pools Diary and in # 29, Ex. 114 an entry was found on page 25 under the inserted entry "M.H. 4/9/64" "NO ACTIVITY IN RIVER EXCEPT PUMP COFFERDAM SEE BARTELL DIARY 8-12-64 L.P.P." The pencil used for this Peterson addition matches that of "(APROX)" page 19, Ex. 113, # 28.

It appears to be clear that the M.H. and LPP insertions were not made contemporaneous with the main entries under which they were inserted. They represent additions in the nature of comments, frequently giving a reference to an entry in some other diary. The date of these insertions

as to "M.H." indicates this man reviewed the diary entries at one time "4/9/64" presumably, considerably later than the dairy entry, and added the insertion. As the insertion on Ex. 114, page 25 of "M.H." dated "4/9/64" existed before the insertion of "L.P.P." which follows, the insertion followed that of M.H. and is dated "8-12-64" indicating that this information inserted was not contemporaneous with the event described and that L.L.P. like M.H. was engaged in reviewing the diary entries and adding his statement so long after the event itself.

This procedure is inconsistent with admission in evidence as a record contemporaneous with the event and is actually in violation of company instructions printed on the diaries. As these are State Highway Engineer diaries the instructions were those of that department. As indicated earlier in this report these "M.H." insertions dated 4/9/64 are evidence of the review of the diaries 4/9/64 which add references to diary entries of other workers.

The diary entry at the bottom of page 19, # 28, Ex. 113, signed "Larry Peterson" reads "BETWEEN DEC. 12, 1963 AT 12:45 P.M. AND DEC. 15, 1963 AT 3:30 P.M." The last sentence of this entry occupying several lines is spaced with reference to the signature so as to raise the question whether it originally ended without the last sentence and was signed while sometime later the last sentence was added being carefully fitted into the space which required the word "out" to be placed to the left of the horizontal spacing of the rest of the paragraph indentation from the left edge of the page. The sentence reads as though complete without this word and it was obviously added after the sentence was completed extending the meaning but not otherwise changing the last sentence.

The spacing of the alleged date of entry of the whole paragraph "1/10/*63*-64 L.L.P." is such as to indicate it was entered before the last sentence was written, that sentence being added after and fitted around the date and sig-

nature. Hence it is clear that the whole entry does not conform to notes contemporaneous with the events recorded, the whole entry describing events from Dec. 12 to 3:30 P.M. Dec. 15. The dates are not consistent with the statement in the entry that the day shift started a 2:00 A.M. Dec. 12 and lasted until 3:30 P.M. since this would be Dec. 13 not 15 or even 14, while the date of making the entry is given as 1/10/*63*-64, while the last sentence was added after.

To gain such evidence as may be obtained regarding the pencils used to make these changes and insertions, the books were submitted to Mrs. Bette Hammon, Chemist Technician at Georgetown University Reference Laboratory, to determine if possible whether ingredients of the graphite compound composing the writing material in the pencils used is consistent or inconsistent with use of the same pencil, for instance to strike out or change digits in the date, or to add the last sentence in the Peterson entry at the bottom of page 19 (Ex. 113) or the word (APPROX.) at the end of the top entry which started on the previous page.

(It should be noted that the questioned entry at the bottom of page 19 is irregular in that it includes the date 12/15 already the subject of the preceding entry which started on the previous page, hence must be considered an extension of that entry or an explanation and extension added later not earlier than 1/10/64.)

Since it is clear that Peterson and M.H. were reviewing diary entries at a much later time than the date of the entry under which comments by M.H. and Peterson were inserted under diary entries of other employees, that of Peterson in Ex. 114, page 25, being dated 8-12-64; it is clear that the second entry for 12/15/63, on Page 19, in the manner in which it was constructed is consistent only with a desire to add to the 12/15/63 record, made at the end of the shift and so dated 12/15/63, the statements of which it is composed, the first entry for that day confining itself to bags of cement making no mention of the loss of the seal.

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This was added ostensibly 1/10/64, originally without the last line and then this was added as though originally part of the whole composition but actually being necessary to fit it in around the ostensible date.

This leaves the contemporaneous nature of the whole entry very much in question.

The results of the chemical analysis have not yet been received the books having been returned after taking samples of the lines to test. As soon as these results are known an additional report will be prepared summarizing the evidence described above and the tests.

* * * *

REPORT # 2

The examination of the diary entries as related to Exhibits # 113-123 has been completed. In order to discover any evidence present in the writing lines consisting of differences in the chemical and material composition of the pencils used, samples of questioned entries were removed by punching out small lines portions. The pencil deposits were then subjected to radiation beams projected through the material to record absorption or excitation effects measuring the response by the spectrum. The instrument used was a very delicate spectrophotofluerometer of a new type. In addition to tests of the actual diary entries preliminary tests of similar known writing materials were made to furnish knowledge of what tests of the questioned material might show.

Although it was found that a relatively large sample must be used to separate writing materials of this kind (pencil) by the composition, at the conclusion of the research experiments the questioned entry materials were nevertheless tested.

The results indicate the apparatus used was unable to distinguish the writing materials, the reason apparently being insufficiency of materials to test.

Research experiments with known materials (pencils) and the questioned entries, sampled in this way, by means of chromatography failed also. In this case the difficulty was caused by inability to elute (dissolve) ingredients of the writing lines.

The conclusions reported are therefore to be considered final, namely:

1. The entries on page 19, Plf. Ex. 113, Diary 28, purportedly written by Larry P. Peterson are concluded to have been written by him.

2. The insertion line 5 "(APPROX.)" was added at a later date than 12/15/63. Evidence is the change in pencil. The actual date cannot be determined.

3. The entry beginning line 8 "12/15/63—BETWEEN DEC. 12, 1963 AT 12:45 A.M. AND DEC. 15, 1962 AT 3:30 P.M.—" purports to have been written 1/10/64 as shown by the repetition of the date at the end. This is a violation of instructions printed in the inside of the diary cover which requires that a line be drawn after making the entry at the end of a shift, to prevent additions of this kind. Instead instructions require such additions to be made on the actual date of the entry, that is in this case the page of a diary book covering 1/10/64. This would be Ex. 115, book 30, pages 20, 21, 22, covering this date. At the end of the last entry for 1/10/64 (actually entered 1/15 according to the date at the end of the entry) appears an insertion calling attention to Polls diary. This exists where the line striking out all spaces below the 1/10 entry is required by instructions to be. Similar insertions are on the next page 23, referring to Pools diary, dated 4/9/64.

It is obvious through examination of all of the diaries, that instructions were not followed, additional entries being present and open spaces below entries which should have been struck out, being used to insert comments, information and references at much later dates not contemporaneous with the work shifts just finished.

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Returning to page 19, Ex. 113, book 28, it is clear that the addition in the second entry for 12/15/63, made purportedly 1/10/64, in the space which should have been struck off to prevent such additions, according to instructions, was for the purpose of recording events not disclosed 12/15/63 by Peterson. His entry that date records the numbers of bags.

According to the plain statement in the second entry, claimed to have been made 25 days later, 1/10/64, during an interval of more than one shift (Dec. 12-15, 3:30 P.M.) seals were broken and water gushed between the flange joints.

The last sentence in this additional 12/15 entry, made 1/10 "Also, at no other time—" refers to cement boiling out, and the word "out" was not in the sentence when first written but was added later.

The accuracy of this questioned entry as a whole and as construed in violation of rules, at that late date, cannot be accepted as a contemporaneous record and appears to be in the nature of hindsight, or review of the memory, such as is indicated by the insertions of "M.H." and Peterson in the various diaries in blank spaces not bearing entries or struck out, actually dated 4/9/64 or 8/12/64. Aside from such insertions diary entries as a whole present no evidence other than page 19, Ex. 113 of non-contemporaneous entries.

* * * *

Exhibit B to Rand Affidavit

CONFIDENTIAL
INVESTIGATION REPORT

Re: Questioned Documents
File No. 2-131-W

November 22, 1972

Re: Examination of Documents

For: Trammell, Rand, Nathan & Bayles, Attorneys-at-Law, 1730 K Street, N.W., Washington, D. C. 20006

Subject: Exhibit # 488 (37 pages) from case of: Oregon v. DeLong Corporation, et al.

Pursuant to your request we have at various times examined and tested this document.

Enclosed is a compilation of the results as determined by the Document Examiner.

Also enclosed is a statement of the qualifications of the Document Examiner.

John T. Lynch Company

by /s/ R. E. Cahill

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Summary

Analysis of Writings Columbia River Bridge Batching Records—Plaintiff's Ex. 488

12-3-63 = 12-15-63

1. 12-3-63 3:00 PM Caption line A, C, D & Date and under printed column headings line 1 are one pencil, line 2, 3, another pencil line 4 signature of Mitzel another. Entry line 7 Changed over to Seal written by another writer. Line 9 to end another writer over signature Harold Freeman except additional in remarks column are different and there are small figures additional in remarks column two figures erasures and changes. Date re-written.

2. 12-3-63 6:00 PM Caption lines A, C, D by writer of page 1 caption except date scratched out and re-written by a different writer and barge number by a different writer. Heading of column 3/8-1/4 scatched out and changed to 1 1/2-1 where 1626 inserted (see evidence of a different writer on pages starting number 26). Under printed column headings line 1 figures by different writer from entries below. Lines 2-6 incl. by writer of Freeman signature but entries beginning line 7 just above by another writer and column Remarks figures (two sets) unlike other writings. Date was re-written.

3. 12-3-63 9:50 P.M. Caption writings unlike entries below column headings and "1626" under 1 1/2-1 column unlike other entries line 1 or below which through line 10 purport to be by Harold Freeman. Entries line 10 to signature Start by another writer and figures in Remarks column differ and show erasures and changes.

4. 12-4-63 9:45 A.M. Pencil caption writings lines B, C, D, and line 1 under column headings unlike other entries on page to signature Start which in different pencil from entries above it. Two sets of entries in remarks the prominent figures being different from adjacent entries in other columns.

5. 12-4-63 8:27 P.M. Caption entries by writer caption entries page 4 all pencil unlike entries line 1 under column headings. Writings line 2-14 incl. by one writer while succeeding entries by another writer until end signed Freeman and under remarks entries before line 14 different writer from those below to end.

6. 12-5-63 8:10 P.M. Caption in ink by writer caption entries pages 4, 5, except barge number. Additional added entries in caption in pencil by same writter and insert pencil by another writer above date. Line 1 under column headings in ink like in caption. Change in figures under "Sand", 1-4, and Cement. Entries lines 2 to end (no signture on sheet) are in pencil and there are two sets of figures under remarks.

7. (Marked 6) 12-6-63 (changed from 5th to 6 by scratching out). Caption entries ink by writer caption entries pages 4, 5, and insert above date in pencil by another writer. Line 1 under column headings same ink as captions same writer but not writer of entries below this line. Lines 2 to end signed Freeman, line 2 words erased and re-written by another writer lines 2 and 3.

8. (Marked 7) 12-6-63 8:50 A.M. Caption entries pencil same as line 1 under column headings except insert different pencil last digit barge number and insert above date. Line 3 through 12 different pencil from caption and line 1 also different from line 14 entries down to signature Start latter entries by different writer.

9. (Marked 8) 12-6-63 6:08 (P.M.) ink caption entries and line 1 except pencil insert above date total bags changed 536 to 535 different writer from entries line 2 to end signature Start. 2 sets figures in Remarks those on line 4 erased and changed. Two writers in ink of caption entries.

10. 12-7-63 (day scratched out and changed) ink caption entries and lines 1 and 2 under column headings different

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ter from pencil entries after ink hour 12:01A to end of et and signature Harold Freeman. (Line 3 to end of et).

1. 12-7-63 Pencil caption entries and line 1 except insert ve date in pencil another writer. Line 2 to line 8 signa- e of Harold Freeman writing thereafter in pencil to sig- ure. H. Mitzel different writer.

2. 12-7-63 9:40A In remarks column one figure scratched and written over while another is very small and nearly sed.

3. 12-7-63 1:50 PM Pencil entries captions and lines un- column headings 1 to 6 signed Mitzel. With different cil figure in remarks column erased and changed. Line end different writing to signature Start.

4. 12-7-63 7:25 P Ink entries captions and lines 1-4 . (except that pencil nsert above date entry by another ter)—lines 5 to end pencil to signature Start.

5. 12-8-63 12:40 A.M. Ink caption entries continue line 1 er column headings except there are two pencil inserts aption above date by a different writer not the writer of 2 to end and signature Harold Freeman.

6. 12-8-63 6:00 AM pencil caption entries one writer ex- t insert above date another writer. No entries under mns of mix content and pencil entries line 1 to line 3 pencil another pencil lines 5, 6 to signature Harold eman. Line 7 to end another pencil and writer to signa- e at end Mitzel.

7. 12-8-63 11:50 A.M. Pencil captions continue line 1 er column headings line 1-3 incl. Line 4 another pencil e writer to line 17 signature Mitzel. Line 19 different cil and writer to end signature Start.

8. 12-8-63 5:10 PM ink caption entries, line 1 under col- n headings and time entries line 3 and 5 one writing act entries thereafter to end in pencil to signature Start

continue. In remarks column are two separate sets of figures with addition sum in different pencil at bottom.

19. Caption in pencil "Pier # 169-B Batching Record" is summary sheet. Caption one pencil, entries below to end another pencil. Erasures and changes line 4 under column headings and for totals at bottom. All same handwriting as 18 signed Start.

20. 12-11-1963 1:05 P.M. Pencil caption entries and line 1 under column headings one pencil. Line 2 different pencil light. Mix figures under line 1 figures (both omitting 1 1/2-1) different writer. Remaining entries to signature Mitzel using same pencil used for captions. After Mitzel signature using different pencil "Releived by W.P.S." to bottom end no signature made by writer of entries other sheets over Start signature.

21. Ink captions "Roto Bag Record" and all entries in ink mostly drawn over pencil entries, sometimes changing these, are similar writings over signatures Start on other sheets.

22. 12-11-63 7:10 P.M. Ink caption entries continue for line 1 under printed column headings show writing features over Start entries other sheets. Pencil entries under column headings thereafter to signature Start, same writer. Last two lines include signature Harold Freeman, different pencil.

23. 12-12-63 12:30 A.M. Ink caption entries continue through line 1 under column headings by same writer as writings over Start signature other sheets. Pencil entries under column headings line 2 to end at bottom signed Harold Freeman, written by different writer from captions and line 1.

24. 12-12-63 6:15 A.M. Pencil caption writings continue through lines 1, 2, 3. Different pencil same writer line 4 to signature Harold Freeman line 7. Different pencil, differ-

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ent writer line 9 to end and signature Mitzel. Two pencils, different writers under "Water" (Remarks) column.

25. 12-12-63 11:00 A Pencil caption entries. Different pencil line 1 entries under column headings. Different pencil line 2 to end and signature Mitzel.

26. 12-12-63 3:25 P Pencil caption entries continue lines 1-4 under printed column headings one writer but under 1 1/2-1 figures "1626" written by another person different pencil and entry above date scratched out and insert change with another pencil by another writer. After signature Mitzel on line 7 all entries by another writer another pencil continue to bottom and signature W. P. Start.

27. 12-12-63 12:15 P Ink caption entries continue on line 1 under printed column headings except under 1 1/2-1 figures are in pencil by different writer. Line 2 different pencil through line 7 signature W. P. Start. Different pencil different writer line 8 to end and signature Harold Freeman at bottom.

28. 12-13-63 6:31 A.M. Pencil caption entries continue one writer line 1 under column headings except date and insert over date another pencil and writer and under column heading "1 1/2-1 different pencil and writer "1626". Line 2 same pencil. Line 3 through line 6 different pencil to signature Harold Freeman. Line 9 to end and signature Mitzel different pencil and writer. Changes in remarks column by scratching out.

29. 12-13-63 10:15 A.M. Two pencils used by 1 writer for caption entries include entries line 1 under column headings except different pencil, different writer under heading "1 1/2-1" (1626 same writer as similar circumstances other sheets). Line 1 to end and signature Mitzel same pencil and writer.

30. 12-13-63 2:45 P.M. Pencil captions continue line 1 under column headings except change in total bags over

date, different pencil and under column "1 1/2-1" different pencil and writer "1626" (same writer as other sheet similar circumstances.) Line 2 to line 7 signature Mitzel one writer. Line 8 to end and signature W. P. Start 1 pencil and writer.

31. 12-13-63 8:50 P.M. Ink caption entries and line 1 except pencil insert above date changing total bags different pencil and writer and under column "1 1/2-1" figures "1626" written by another writer different ink. Line 2 under "Sand" and "1-4" are pencil insertions by different writer different pencil. Line 3 through line 10 one pencil to signature Start. Line 11 to end different pencil to signature Harold Freeman.

32. 12-14-63 2:15 A.M. Ink caption entries continued on line 1 except insertion above date in pencil different writer and on line 1 under heading "1 1/2-1" are figures "1626" different ink and writer (same as similar circumstances other sheets). Line 2 pencil (different from pencil insertion above date) entries to end and signature Harold Freeman same writer as ink caption entries.

33. 12-14-63 6:50 A.M. Ink caption continues on line 1 and time line 2 except "Barge # 170" different writer and pencil insert above date is different writer and on line 1 under "1 1/2-1" the figures "1626" are written with different ink and different writer. Pencil entries lines 2, 3, 4, 5 to signature Harold Freeman by one writer and line 7 to end different pencil and writer to end and signature Mitzel.

34. 12-14-63 11:20 A. Pencil caption entries continuing through line 1 except different pencil Barge number and under "1 1/2-1" figures "1626" different pencil and writer (same as on other sheets same circumstances). Entries line 2 to end and signature Mitzel different pencil except line 3 insert different pencil and light entries different pencil below signature Mitzel under "Remarks".

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35. 12-14-63 4:10 P. Pencil entries caption continues line 1 except under "1 1/2-1" different pencil and writer of figures "1626". Line 2, 3 to signature Mitzel. Different pencil and writer, line 6 to end and signature Start.

36. 12-14-63 10:40 P. Ink caption entries continue line 1 except different ink and writer under "1 1/2-1" in figures "1626" same as in other sheets with similar circumstances. Pencil line 2-7 and signature Start. Different pencil line 8 to end including signature Harold Freeman and different writer.

37. 12-15-63 4:11 A.M. Ink captions continue on line 1 except different writer "BARGE # 173" and under "1 1/2-1" figures "1626" different writer and ink. Pencil entries line 2 to end and signature Harold Freeman.

REPORT # 2 — EXHIBIT # 488

With completion of the ink analysis concerning the captions at the top of the Columbia River Bridge log sheets and the number entries on line 1 under the printed columnar headings, data obtained by analysis can now be summarized as an addition to previous reports, particularly the summary report of July 18, 1970.

The need for this analysis developed when it was discovered that more than one writer wrote captions above the column headings on many logs, and the figures of line 1 describing the concrete mixes, particularly "1626" under "1 1/2-1", were, on many logs, written by a different writer than the writer who wrote the figures at the heads of the other columns.

The chemical ink analysis was attempted by chromatography through punching out minute line portions and then dissolving the ink. The caption and figure inks are black and were fluid, not ball point pen impressions. Thus they appear similar in composition. The appearance is that of drawing ink a suspension of carbon. It was found the ink samples did not dissolve.

Therefore this method was abandoned and tests were made by the spectrophotofluorometer. This projects a light beam through the ink lines and the paper, drawing automatically curves on graph paper which measure the light absorption as the spectrum changes. These curves are then compared to discover those which match and any which do not.

It was found the caption entries on logs numbers 7, 9, and 36 were written with different inks as indicated by divergence in their curves, the remainder of the logs being similar in ink.

It was found the numbers line 1 are different on logs 14 and 36 in the inks used.

In general the inks of the other entries are the same.

Observational studies of "1626" entries under "1 1/2-1" where differences in figure designs were discovered, as compared with adjacent numbers heading the other columns, indicate some differences in pens exist as well as in inks.

This indicates the time of entering "1626" was different from that of entering the other line 1 concrete mix entries. It is not possible to discover how long an interval occurred.

Dyes used in inks change in composition after being impressed on paper because of exposure to oxygen in the air and other aging factors. The results of the chemical tests therefore must be understood as defining conditions at the time of the tests only. Inks of the same composition impressed on paper at substantially long intervals react to disclose differences (at the same testing date) caused by differences in dates of writing sufficiently large to have caused changes (or have been different in composition when written).

The test results in this case therefore indicate substantial differences in time of entry or use of a different ink

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(where reported above as found different). This is as close to an estimate of when the entries were made as it is possible to reach in this case.

In many logs the caption entries above the column headings were made by one writer, not the writer of the shift entries line 2 on, indicating one person filled this portion in repeatedly for other workers who then made their entries by the times given, sometimes signing at the end of the shift. These writers of the shift entries on some logs added to the caption entries, sometimes particularly in bag totals above the date. Sometimes shift workers did write captions as well as hourly entries.

Figures under "Remarks" frequently differ from the writing of the shift worker and there are sometimes two sets of figures often by different writers.

The writings of Freeman, Mitzel and Start in the hourly reports whether signed by them or not were identified with their examples as a whole, and some captions written by Freeman and Mitzel were similarly identified. With regard to Start: his example and hourly entries in handlettering closely resemble the group of caption entries made by the writer not on the shift of that log; but at the same time examples of handletterings by other employees also resemble these captions. Because the captions are limited in amount, identification of the person who filled in captions in this group should await receipt of additional examples of possible writers, so as to study as exactly as possible the evidence available. This writer of group captions must be either Start or another person who writes very much like him.

Because of the evidence discovered it is my opinion the mix data figures and the captions written in the black inks, were not impressed day by day by the shift worker who made the first hourly entries as a custom and additions and changes were made in the mix data figures line 1.

Oregon Statutes

DISQUALIFICATION OF JUDGE

14.210 Disqualification of judicial officers for cause; application of section; waiver. (1) A judicial officer shall not act as such in a court of which he is a member in any of the following cases:

(a) When he is a party to or directly interested in the action, suit or proceeding;

(b) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(c) When he is related to any party, or to the attorney for any party, or to the partner or office associate of any such attorney, by consanguinity or affinity within the third degree;

(d) When he has been attorney in the action, suit or proceeding for any party.

(2) This section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in paragraphs (c) and (d) of subsection (1), the disqualification may be waived by the parties, and, except in the Supreme Court, shall be deemed to be waived, unless an application for a change of the place of trial is made as provided by statute.

14.220 [Repealed by 1955 c. 408 § 2]

14.230 [Repealed by 1955 c. 408 § 2]

14.240 [Repealed by 1955 c. 408 § 2]

14.250 Disqualification of judge for prejudice; transfer of cause or calling judge; making up issues. No judge of a circuit court of the State of Oregon, including such judge when sitting in a department of probate or a department of domestic relations or a judge hearing or trying probate or

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a department of domestic relations or a judge hearing or trying probate or domestic relations matters or proceedings in counties in which such probate or domestic relations matters or proceedings are heard or tried by the circuit court or a judge thereof, shall sit to hear or try any suit, action, matter or proceeding when it shall be established, as provided in ORS 14.250 to 14.270, that such judge is prejudiced against any part or attorney, or the interest of any party or attorney appearing in such cause, matter or proceeding. In such case the presiding judge shall forthwith transfer the cause, matter or proceeding to another department of the same court, or call in a judge from another department of the same court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned. [1955 c. 408 § 1(1)]

14.260 Affidavit and motion for change of judge; time for making; limit of two changes of judge. Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court, including matters or proceedings in a department of probate or a department of domestic relations in those counties where probate or domestic relations in those counties where probate or domestic relations matters or proceedings are heard or tried by the circuit court or a judge thereof, may establish the prejudice described in ORS 14.250 by motion supported by affidavit that the judge before whom the cause, matter or proceeding is pending is prejudiced against such party or attorney, or the interest of such party or attorney, so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, and that

it is made in good faith and not for the purpose of delay, which affidavit shall be filed with such motion at any time prior to final determination of such cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after such cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office or another judge to preside over such cause, matter or proceeding, but no motion to disqualify a judge shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding, and no motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides, shall be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment. In judicial districts having a population of 100,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270. No party or attorney shall be permitted to make more than two applications in any cause, matter or proceeding under this section. [1955 c. 408 § 1(2); 1959 c. 667 § 1]

14.270 Affidavit and motion in counties with presiding judge; time for making; limit of two changes of judge. In any county of the State of Oregon where there is a presiding judge who hears motions and demurrers and assigns cases to the other departments of the circuit court for trial, the affidavit and motion for change of judges to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer; oral notice of the intention to file the motion and affidavit shall be sufficent compliance with this section providing that the motion and affidavit are filed not later than the close of

the text judicial day; but no motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to himself any cause, matter or proceeding in which he has previously ruled upon any such petition, motion or demurrer, then in such case any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section. [1955 c. 408 § 1(3); 1959 c. 667 § 2; 1969 c. 144 § 1]

* * * * * * * * * *

17.250 Jury judges of the effect of evidence; instructions. The jury, subject to the control of the court, in the cases specified by statute, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

(1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

(2) That they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds;

(3) That a witness false in one part of his testimony is to be distrusted in others;

(4) That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution;

(5) That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence; that in criminal cases guilt shall be establish beyond reasonable doubt;

(6) That evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

(7) That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

* * * * * * * * * * *

41.360 Disputable presumptions. All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions, and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption. The following are of that kind:

* * * * * * * * * * *

44.010 Witness defined. A witness is a person whose declaration is received as evidence for any purpose, whether it is made on oral examination, by deposition or by affidavit.

* * * * * * * * * * *

Exhibit 113

Sunday, December 15, 1963 weather cold and cloudy rain
PM 6:15 A.M. Bagge

172 in with 12 bages when I arrived. Barge 170 standing by with 103 bages. 7:30 AM Barge 170 now in place with 103 bags 2172 cu. yds. at this time not counting waste. 9:30 AM moved tremie tub 70 southwest corner. 9:50 AM tremie tube moved batching operation back to normal. 11:00 AM slump 7" air 5% 2281.5 cu. yds. approx. 12:30 P.M. 3 cyl. slump 7¾" air 5%. 1:00 PM barge 171 arrived with 92 bage. 1:20 moved trimie tub. 1:35 P.M. operations back to normal; 3:30 P.M. finished; Barge 171 had 46 bages left on barge. Total yardage 2395.5 cu. yds. not counting waste approx.).

LARRY PETERSON
12/15/63

Between Dec. 12, 1963 at 12:45 A.M. and Dec. 15, 1963 at 7:30 P.M. Pier 169 East Coffer Dam Seal Pour.

On my day shift which started at 7:00 A.M. and lasted till 3:30 P.M. I noticed more than once that the seal was lost. During this time the seal was lost I noticed water gushing between the flange joints of the tremie tub. Also I noticed cement boiling up from the bottom, which made the water milky color. This was fixed right away by DeLong putting a rubber ball in the tremie tub, this regained the seal when the next bucket was poured down the tremie tub. Also, at no other time did I notice cement boiling on top of the surface or water gushing out between the flanges.

LARRY PETERSON
1/10/69

DEFENDANT'S EXHIBIT H. 59323

PLAINTIFF'S EXHIBIT 59323

OREGON STATE HIGHWAY DEPARTMENT

Order for Extra Work

TO BE PERFORMED ON FORCE ACCOUNT BASIS

Project Name Columbia River Bridge (Piers for superstructure) Date 17 October 1963

Highway Ore. Oregon Coast U.S. 101 Contract No. 6124

County CLATSOP Prefix 4-1803

Contractor DeLong Corporation F. A. Project No. F-003-1(18)

Address P. O. Box 330, Astoria, Oregon Order No. 2 - Supplemental

The following work is hereby classified as "Extra Work", to be performed and paid for in accordance with the terms of contract.

Description of work to be done:

Construct and place brush fascines in excess of that anticipated on original order. Furnish and place 4" minus rock and 1½" - 1" aggregate armor blanket. Fascines, rock and aggregate in erosion control on the river bottom around Pier 169.

1. Maximum equipment rental rates allowable as per A.G.C. agreement.
2. Percentage allowed contractor is in accordance with executed contract for the job.

Location by station numbers:

Pier 169 Station 292 + 75 to 294 + 00

Estimate of quantities and cost:

Original order: $20,000.00
Additional amount this order: $ 180,000
Total $200,000

Explanation: (Explain here the conditions which cause this work to be classed as "extra work")

Erosion resulting from scour action due to construction of pier not previously anticipated and no erosion work included in the contract. Erosion control work necessary to prevent undermining of footings and to allow installation of timber fender around pier - Erosion control work became more extensive than anticipated on original order.

INSTRUCTIONS: A single order should not cover more than one class of work or more than one extra work job.

Submit five copies of the order to Salem. After approval of the order by the assistant state highway engineer, the Salem office will send one copy to the contractor, one to the division engineer and one to the resident engineer.

Project authorization . . . . . $ 8,857,724

Present estimate of project cost, including $180,000.00 for work under this order $ 8,557,724

Expected under-run / over-run amount . . . . . $ —

Expected under-run / over-run per cent . . . . . —

Space to right of this line is for use of Salem Office

Submitted by: R. W. Ellison
Resident Engineer

Approval Recommended: R. D. Calvert
Division Engineer

Approval Recommended: Bruce Williamson
Construction Engineer
Bridge Engineer

Approved: P. M. Lee
Assistant State Highway Engineer
Office Engineer

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Form 2-59—15M—6 63

OREGON STATE HIGHWAY DEPARTMENT
Materials Division

Laboratory Report

Project: Columbia River Bridge
Highway: Oregon Coast
Contractor: DeLong Corp.
Submitted by: R. W. Ellison

Pr. No. 7949 Project No. 4-(13)38
County Clatsop
Contract No. 6184 F. A. Project No. U-4-003-1(14)
Date reported January 7, 1964

REPORT ON SAMPLE OF PORTLAND CEMENT CONCRETE

Class Seal Concrete for Mid Section Seal Footing Pier 103 Downstream
Represented by 3 cylinders, set number R-75 Date cast December 8, 1963
Sampled by D. Bartell Date received December 9, 1963

TEST RESULTS

Curve A—
Fine Agg.: Data Sheet No. Lab. No. Per cent Size
Data Sheet No. Lab. No. 664130 Per cent 100 Size Sand Fine. Factor

Curve B—
Coarse Agg.: Data Sheet No. Lab. No. 669870 Per cent Size 1"-1 Fine. Factor
Data Sheet No. Lab. No. 664133 Per cent Size 1-#4 Fine. Factor
Data Sheet No. Lab. No. Per cent Size Fine. Factor

Curve C—Combined Agg.: Fine Aggregate % Coarse Aggregate % Size Fine. Factor
Cement: Brand Permanente Type I Insp. Report No. Lab. No. 664925
Calculated strength in 28 days 3000 lbs./sq. in. using 7-9 in. slump. Real Mix—1: W/C Ratio
Nominal Mix: Volume—1: Weight—94: 177.5:372.5
Remarks: 6.93 Sk. mix. Poured at 8" slump. Entrained air 4.0%. Concrete dry batched into roto bags at Tongue Point and mixed on mixer barge 103 at pier site. Cylinders field cured 24 hrs. on mixing barge.

Lab. No.	Data Sheet No.	Cylinder	Compressive Strength	Date	Remarks on Break
		A	lbs. per sq. in. at	days	6,
A-0250	C22514	R-75B	5235 lbs. per sq. in. at 28	days January 5, 1964	
A-0251	"	" C	5375 lbs. per sq. in. at 28	days January 6, 1964	
		D	lbs. per sq. in. at	days	
		E	lbs. per sq. in. at	days	
		F	lbs. per sq. in. at	days	

RECOMMENDATIONS

TEST REPORT DISTRIBUTION:
Bureau of Public Roads
Construction Engineer
Maintenance Engineer
~~x~~ Bridge Engineer
Requisition Office
x Division Engineer2
x Resident Engineer Allison
Dist. Maint. Sup't
x Files
Materials Division (Salem)
State Printing $2502

R. W. Ellison
By

[signature] Engineer of Materials

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7

OREGON STATE HIGHWAY DEPARTMENT

TABULATION SHEET ..... SHEET ..... OF ..... SHEETS

Coto Bags — COLUMBIA RIVER BRIDGE

CONCRETE POUR RECORD

TYPE MIX: 6.93 SK. SEAL — POUR LOCATION: PIER 331 — Barge #172

STATE PRINTING — DATE: Dec 5, 1963

TIME	TRUCK	CU. YD.	3/8 – 1/4	SAND	1 1/2 – 1	1 — 4	CEMENT	AEA	WATER	REMARKS
AM 12:01		1½		4733	1626	2882	977		6.0%	SAND MOIST
	IIII IIII II	12:10 AM.		CARRIAGE Hoist cable pulled						
2:00		CUT ON DRUM								12
	IIII	cable, 12:51 A.M. START BAGGING.								
AM 1:00		1:10 AM. EMPTY Coto Bag. Hoist Control Cable Pulled								16
	IIII IIII	LUNCH 1:30 AM Cable SPLiced And crew START								
AM 1:00		PRODUCTION								26
	IIII IIII I	2:15 AM CARRIAGE Forward direction cable								
AM 5:00		STRAN-12d Crew REPLACING. 3:22 PM CREW START								37
	IIII IIII IIII	BAGGING AGAIN								
AM 5:00										56
	IIII IIII III									
AM 7:00										74
	IIII IIII III									
AM 9:00										92
		TOTAL 92 BAGS 6.93 MIX								
		8:00 A.M. 12-6-63 Harold Freeman								

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FILED
FEB 6 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION, *Respondent.*

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BERT B. RAND,
HANS A. NATHAN and
JAMES Q. SMITH,
1730 K Street, Suite 308,
Washington, D.C. 20006

GEORGE W. MEAD
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Portland, Oregon 97204

ARDEN E. SHENKER
801 Standard Plaza
Portland, Oregon 97204

Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Opinion

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Department 2

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION, *Respondent and Cross-Appellant,*

v.

DELONG CORPORATION and TRAVELERS INDEMNITY COMPANY, *Appellants and Cross-Respondents.*

* * * * * * * * *

Appeal from Circuit Court, Marion County.

George A. Jones, Judge.

Argued and submitted September 27, 1971.

Norman E. Bayles and Bert B. Rand, Washington, D.C., argued the cause for appellant and cross-respondent DeLong Corporation. With them on the briefs was George W. Meade, Portland.

Lamar Tooze, Portland, argued the cause for appellant and cross-respondent Travelers Indemnity Company. With him on the briefs was Arden E. Shenker and Tooze, Powers, Kerr, Tooze & Peterson, Portland.

Alan H. Johansen and George A. Rhoten, Special Assistant Attorneys General, Salem, argued the cause for respondent and cross-appellant. With them on the brief were Lee Johnson, Attorney General, and Jacob B. Tanzer, Solicitor General, Salem.

Before Schwab, Chief Judge, and Foley and Fort, Judges.

FORT, J.

Affirmed.

FORT, J.

This declaratory judgment proceeding seeks a determination of the rights and liabilities of the parties arising out of a contract for construction of major components of the Columbia river bridge between Astoria, Oregon, and the state of Washington. The DeLong Corporation was the contractor and Travelers Indemnity Company the surety on the performance bond. The case was tried to the court without a jury. Following the conclusion of the trial,[1] the court:

(1) Found that plaintiff properly terminated DeLong's contract prior to its completion;

(2) Granted judgment against both defendants for general damages in the amount of $1,719,864.19;

(3) Granted judgment against both defendants in the amount of $952,000, representing liquidated damages accruing on and after the date the contract was canceled by plaintiff;

(4) Dismissed DeLong's counterclaims;

(5) Awarded plaintiff attorneys' fees in the amount of $250,000.

Defendants appeal and plaintiff cross-appeals, each asserting numerous errors.

SCOPE OF REVIEW

In Reif v. Botz, 241 Or 489, 406 P2d 907 (1965), the Supreme Court considered the scope of review on an appeal from a declaratory judgment proceeding. The court said:

> "* * * This proceeding being legal in nature, the defendant was entitled to a resolution of the questions

[1] The trial itself extended for more than six months, producing a transcript in excess of 9,000 pages and over 900 exhibits.

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of fact as in action at law. See specially concurring opinion on rehearing in *Oregon Farm Bureau* v. *Thompson*, 235 Or 162, 199, 378 P2d 563, 384 P2d 182.

"Since the findings of a trial judge sitting as a trier of the facts in an action at law are entitled to the same finality as the verdict of a jury, his findings must be sustained if there is any evidence in the record to support them. We measure the evidence against this standard." 241 Or at 491.

The defendants cite us to Consolidated Freightways, Inc. v. Flagg, 180 Or 442, 176 P2d 239, 177 P2d 422 (1947), in support of their contention that we are at liberty in this proceeding to review the record de novo. The most recent pronouncement of our Supreme Court on the issue, decided since the briefs were filed and the argument heard here, is found in May v. Chicago Insurance Co., 93 Adv Sh 846, —— Or ——, 490 P2d 150 (November 5, 1971), and is as follows:

"As a preliminary matter, we consider the scope of our review. Plaintiffs contend citing *Consolidated Freightways, Inc.* v. *Flagg*, 180 Or 442, 176 P2d 239, 177 P2d 422 (1947), that on review of declaratory judgment proceedings this court is not bound by the trial court's findings of fact. Defendants respond that even though this court may not be bound by findings of fact in a declaratory judgment proceeding, it normally accords weight to the circuit court's decision.

"The parties' contentions on this question are applicable only to declaratory judgment proceedings which are basically equitable in nature. The broad language in *Consolidated Freightways* on which plaintiffs rely, 180 Or at 458, is no longer controlling in all declaratory judgment proceedings. It is now clear that such proceedings will be treated as either legal or equitable,

depending upon their nature. *Mayer* v. *First National Bank of Oregon*, —— Or ——, 489 P2d 385, 392 (September 29, 1971); *Oregon Farm Bureau* v. *Thompson*, 235 Or 162, 179, 378 P2d 563, 384 P2d 182 (1963). We have treated declaratory judgment proceedings to determine coverage under insurance policies as legal in nature, rather than equitable, with the consequence that the trial court's findings of fact in such cases are binding on us if supported by any substantial evidence. *Falk* v. *Sul America Terrestres*, 255 Or 246, 248, 465 P2d 714 (1970); *Oregon Farm Bureau* v. *Thompson*, supra, 235 Or at 199, 200-205 (concurring and dissenting opinion on rehearing, representing the views of five members of the court on this question). See, also, *Reif* v. *Botz*, 241 Or 489, 406 P2d 907 (1965). We cannot, therefore, accept the parties' invitation to review the evidence in this case de novo. We must accept the trial court's findings of fact if those findings have adequate support in the evidence." 93 Adv Sh at 851-52.

The complaint and the cross-complaint here are both in the nature of an action to recover damages for breach of contract and as such are legal in nature. Accordingly, in reviewing this case on questions of fact we do so only to determine "if those findings have adequate support in the evidence." *See, also* Oregon Farm Bureau v. Thompson, 235 Or 162, 176, 378 P2d 563, 384 P2d 182 (1963); Williams v. Stockman's Life Ins., 250 Or 160, 441 P2d 608 (1968); Western Bank v. Morrill, 245 Or 47, 61-62, 420 P2d 119 (1966).

STATEMENT OF FACTS

The facts established by the evidence and necessary to an understanding of the trial court's findings are as follows. The Astoria bridge was to be constructed across the mouth of the Columbia river by the Oregon State

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Highway Commission, plaintiff herein, pursuant to agreements between the states of Oregon and Washington.

Plaintiff and defendant DeLong, on June 29, 1962, entered into a written contract for the construction of certain piers which were to constitute a major portion of the substructure of that bridge. This contract was preceded by years of extensive engineering and financial studies by the federal government and both states. Core borings across the proposed alignment of the bridge were made and the detailed results were reported in boring logs and laboratory reports.

On May 19, 1962, the Commission put out for bids its proposal for construction of the substructure of the Astoria bridge. It included detailed drawings, the Oregon State Highway Department's "Standard Specifications for Highway Bridge Construction" and the "Special Provisions for Highway Construction." The proposal called for the construction of 27 concrete river piers and five concrete shore piers. Bids were to be submitted on June 27, 1962.

DeLong assembled a team of engineers to study the available data. They visited the site and talked with a number of special consultants familiar with the project area. Thereafter DeLong submitted its bid, and on June 29, 1962, the Commission approved the award of the contract to DeLong.

The bid proposal required the bidder receiving the award to submit a performance bond prior to the actual execution of the contract. Pursuant to this requirement, DeLong contacted defendant Travelers Indemnity Company, who, after carefully examining the plans, special provisions, bond and contract, executed and delivered to plaintiff on June 29, 1962, a performance bond to secure performance by DeLong of its contract.

The contract was executed on June 29, 1962, and was to be completed in two years. It provided for the following dates of completion:

Unit I: Piers 170 through 175 and spans over 172, 173 and 174 to be completed by October 31, 1963.

Unit II: Piers 5 through 12, 160 through 167 to be completed by November 30, 1963.

Unit III: Piers 168 and 169 to be completed by January 31, 1964.

Unit IV: Piers 13 through 20 and all other work under the contract to be completed by June 30, 1964.

Pier 169

It is Pier 169, the largest of all the piers, around which much of the factual controversy in this case centers. This pier was designed to stand upon two seals, the east and the west seal. Each one was rectangular, measuring about 45 feet by 90 feet, and was to be placed at or below the river bottom level. The work first involved underwater excavation where each of the pier seals was to be placed. The next step was to drive 528 steel foundation pilings into the river bottom. They were to be equally divided between the two seals. Then came the construction of the cofferdams. These cosisted of interlocking sheets of steel extending around the perimeter of each seal area, in effect making two steel boxes approximately 45 by 90 feet. Next was the pouring of the concrete within the cofferdams. This underwater pour utilized the "tremie" method, a method authorized under the contract.

Generally, the tremie method involves extending one or more pipes to the bottom inside each cofferdam. After a pipe is cleared of water, concrete is poured into a hopper attached to the top of the pipe by a telescoping joint.

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The initial concrete poured down and out the open end of the tremie pipe forms a small mound on the bottom. Thereafter the lower end of the pipe is kept imbedded in the concrete. If the pour is continued at the proper rate and pressure and with proper techniques, the "live" pile or piles of concrete continuously expand internally, ultimately filling the cofferdam to the desired elevation. The result is a solid block of concrete, the water having affected only the outside layer. This construction process was undertaken by DeLong, but, for reasons discussed below, the concrete in the seals was found to be defective in January 1964, and controversy arose between the plaintiff and DeLong as to its cause. Basically, each claimed it was the other's fault and duty to absorb the extensive removal and replacement cost.

Subsurface Information

There were a number of delays both before and after the discovery of the defective seals at Pier 169. By way of defense, the defendants assert that not all of the detailed data available to plaintiff was shown on the contract plans. Thus they contend the problems and delays encountered by DeLong during various phases of construction, and particularly with reference to Pier 169, were due to unanticipated foundation conditions, many of which they claim were known to plaintiff but withheld from defendants.

The trial court found contrary to defendants' assertions regarding the alleged lack of data made available by plaintiff. The court's letter opinion states, *inter alia:*

> "Defendant contends that plans and specifications [supplied by plaintiff], particularly regarding sub surface information, were false and fraudulent and that they were wrongfully induced to enter into the contract because of said fraudulent misrepresentation. The Court rejects Defendant's claim in this

regard, in that Defendant's employees had all the sub surface information that was available to the plaintiff a considerable amount of time prior to beginning the work, further the Court finds that sub surface information furnished on the plans was a reasonable representation of the difficulties expected to be encountered beneath the surface as construction progressed."

There was substantial evidence to support the above conclusion. As the plaintiff points out, the "sheer physical volume of the original boring logs, with associated laboratory reports, etc., testifies eloquently as to why all this data was not reproduced on the plans." Furthermore, after examining the contract plans and summary of the boring logs, Mr. Arthur Elliott, bridge engineer for the California Division of Highways, testified that the information thereon would alert a contractor to the general condition prevailing across the mouth of the Columbia river. He testified:

> "* * * [O]bviously [Exhibit 36, a summary of parts of the information in the boring logs available to DeLong] doesn't contain all the information that is contained from the boring logs, but outside of a few minor discrepancies, or not even discrepancies, differences, it conveys, I think, a correct and reasonable impression of what the bar across the mouth of the Columbia looks like, and I think that it as such, would convey to a contractor a fair representation of what he might be expected to encounter in the construction of this bridge."

More importantly, however, before submitting their bids, all bidders, including DeLong, were advised that further information on the propect could be obtained from the division engineer in Salem or the resident bridge engineer in Astoria. The name and address of each was

furnished. Mr. George Taite, the leader of the team formulating DeLong's bid, although aware of their existence, made no effort to obtain the original boring logs.

In accepting the contract, DeLong warranted that it

> "* * * has made a careful examination of the plans, specifications, and contract; that he has fully informed himself as to the quality and quantity of materials and the character of the work required; and that he has made a careful examination of the location and condition of the work and the sources of supply for materials."

Article 2.1.1 of the proposal provided:

> "The subsurface material at the site, as shown on the plans, represents the best available estimate of the existing conditions based on explorations made by the highway Commission. The Highway Commission does not guarantee that material encountered will conform to that shown on the plans."

Pile Driving

There was much testimony relating to DeLong's experiences in driving the foundation piling. Despite defendants' numerous assertions to the contrary, it is sufficient here to say we find that there was substantial evidence to support the trial judge's conclusion

> "* * * that the extensive testimony and much ado made, regarding sub surface conditions was a makeweight argument by the Defendant in this case in order to divert attention from the real problem that led to the termination of the contract; that is, the final responsibility for the pouring of the bad concrete seals at Pier 169, particularly in light of the fact that all the piling necessary for completion of this project had been driven with no more difficulty, than should

have been anticipated while driving piling in the estuary of this great river."

Scour

An additional area of dispute around which much controversy centered concerned the development of "scour" around the cofferdams at Pier 169. The court points out:

> "Defendant makes much of the scour problem which occurred at Pier 169 and the subsequent events relating thereto, although the protection of the cofferdams at Pier 169, under the contract, was basically the responsibility of the Defendant. Plaintiff, for reasons of its own, undertook to abate this scour condition and did stabilize the bottom of the river by use of fascines and large quantities of rock. This necessitated the redriving of a cofferdam and adjustment of the lower level of the concrete seals before pouring could commence."

It appears from the evidence that the condition known as scour frequently occurs when an obstacle, such as a bridge foundation, is placed in a river. The obstruction changes the flow of water in that vicinity, which in turn affects the existing stability of the river bed material. Where this occurs, the bottom material is carried away, similar to the effects of erosion on land, leaving holes in the river bed in and around the obstruction.

In designing bridge foundations, one of the foremost considerations is the determination of probable scour, for, if the foundations are designed without due regard for that contingency, the foundations may be undermined, causing the bridge to collapse. Thus, the foundations must be placed sufficiently deep into the river bed to safeguard against the effects of scour.

It is not disputed that severe scouring occurred at Pier 169, and that extensive corrective measures were under-

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taken at the state's expense. On the morning of September 16, 1963, scour was detected in the area of the recently completed upstream cofferdam. The scour situation progressively worsened and, on September 19, the state sent to Astoria Mr. Glen Paxon, who at the time was one of its special engineering consultants, At the state's insistence, appropriate measures were taken to arrest the scour and build the river bed back to a satisfactory level.

Mr. Hans Wendel, who DeLong's chief engineer, testified that he anticipated there would be some scour in the area of Pier 169. Furthermore, an Army Corps of Engineers report concerning conditions relevant to scour potential at the mouth of the Columbia river was available to DeLong as a public document.

Pursuant to the provisions of the contract, DeLong's cofferdam plans were submitted to the state and, after certain suggested revisions, were approved subject to the terms of the contract imposing upon the contractor responsibility for the "successful use and safety" of the cofferdam design details. By the terms of the contract, DeLong also agreed that

> "Until final acceptance of the contract the contractor shall be held responsible for any injury or damage to the work or to any part thereof by the action of the elements, or from any cause whatsoever, and he shall make good at his own expense all injuries or damages to any portion of the work before its completion and final acceptance.
>
> "• • • •
>
> "The contractor shall accept the compensation, as herein provided in full payment for furnishing all materials, labor, tools and equipment, and for performing all work under the contract, also for all loss, damage, or liability arising from the nature of the work, or from the action of the elements, or from any unfore-

seen difficulties which may be encountered during the prosecution of the work until its final acceptance by the Commission."

Causes of Bad Concrete

The defendants argue in part that the scour condition was somehow related to the cause of the poor concrete at Pier 169. The court expressly rejected this theory, stating:

> "Defendant attempted to relate the scour condition to the ultimate failure of the concrete poured into the two cofferdams constructed at Pier 169, this concrete was to be the seals atop the piling driven at this site, which in turn formed the base for one of the main piers supporting the span across the main river channel.
>
> "The Court rejects the Defendant's theory and accepts the testimony of Plaintiff's experts, relating to the cause of the poor concrete at Pier 169, the basic causes being a slow rate of pour, the failure to use more than one tremie pipe during the period of the pours, and the failure to maintain a tremie pipe in such condition as to exclude excess water during the time of the pour. These factors allowed the concrete to segregate and bulk, which in turn accounted for the underruns experienced at Pier 169. The pouring of a good seal, of course, was the Defendant's responsibility under the contract, and once it was discovered that the seals were bad, it was the defendant's responsibility to remove and replace said concrete with an acceptable work product. This the Defendant failed and refused to do, and this was adequate grounds for Plaintiff to cancel the Defendant's contract, and acting in the public interest, to proceed with another contractor, for the completion of the substructure work."

In the case of both the upstream and downstream seals, there was found, upon completion of the pours, to be un-

derruns of concrete of about 1,000 cubic yards; that is, each seal with a theoretical volume of 3,000 cubic yards was filled by only 2,000 cubic yards of concrete. The cofferdams were dewatered in late December 1963, and the state completed on January 9, 1964, a coring program on the seals which showed that quantities of river sand were present in the seals and considerable segregation existed between the aggregate and the cement. Both of these conditions were in violation of the Standard Specifications.

Defendants' theory at the trial was that vast quantities of stream bed material somehow worked their way under, over or through the steel cofferdams and into the seal area. These "adverse hydraulic conditions," the defendants asserted, "at least partially" were responsible for the defective pours at Pier 169.

In refuting defendants' theory, the plaintiff called Mr. Glen Paxson, a highly qualified former deputy state highway engineer with over 40 years' experience in bridge construction. He testified that, in his opinion, the underrun in the seal concrete was not caused by the intrusion of materials from outside the cofferdam. Basically, this was because the only way for sand or other stream bed material to get into the seal area was down the outside of the cofferdam piles, under the tips, and up the inside of the cofferdams. Neither the minimal difference in hydraulic "head" nor any differences between the weight of materials inside and those outside the cofferdam was sufficient to have forced sand underneath the sheet piles. "The probability of such a thing happening is so remote that it can be considered as impossible." This conclusion was supported by the testimony of other competent experts called on behalf of the state.

Both seals at Pier 169 were poured through a single tremie pipe. In contrast, the evidence indicated that the seals of comparable size at Pier 170 were poured with at least two and perhaps four tremie pipes. A number of

well qualified experts testified on behalf of the state regarding the necessary number of tremie pipes for a pour of the magnitude at Pier 169; each opinion varied somewhat as to how many tremie pipes should properly have been used, but all agreed that one tremie pipe was clearly not enough.

The rate of pour at Pier 169, found by the court to be too slow, averaged 25 to 30 yards per hour at the two seals. The evidence indicated that at the time the contract was awarded the DeLong management contemplated a maximum rate of pour of tremie concrete in the seals of about 70 to 100 yards per hour, and on January 22, 1964, after it was discovered that the seals were defective, DeLong itself acknowledged that the rate of pour at Pier 169 had been about 25 or 29 yards per hour, and that on future tremie pours it should be about 80 yards per hour. In addition to this evidence, there was substantial expert testimony from witnesses that the slow rate of pour was one of the significant factors in producing the defective material in the seals at Pier 169.

Article 2.4.9. of the contract states, *inter alia*, "Concrete shall be placed so as to avoid segregation of the materials." The same section further requires that "[As] far as practicable, the pipes shall be kept full of concrete during placing and their lower ends shall be kept buried in the newly placed concrete."

Upon discovery of the condition of the seals at Pier 169, the Commission determined they were unacceptable, and DeLong was advised on January 9 that it would be required to replace the seals at its expense. The last work at Pier 169 was on or about January 16, 1964; pumps were removed by DeLong on January 24 and never returned there. There followed a series of meetings between DeLong and Commission officials.

Following extensive discussions, DeLong, on February 18, 1964, filed in the United States District Court for the

District of Oregon a complaint for Declaratory Judgment and injunctive relief against the Oregon State Highway Commission seeking "to terminate the contract between it and defendant Oregon State Highway Commission and to be excused from further performance thereof" and also seeking "compensatory and consequential damages from the defendant Oregon State Highway Commission because of the material breaches thereof by defendant Oregon State Highway Commission."[2]

Toward the end of the week ending February 22, 1964, Mr. Hans Wendel, DeLong's chief engineer, told plaintiff that because the job was in litigation in federal court, DeLong would not be working at any location other than where it was working that week. Work that week did not include any work on Pier 169. Mr. Wendel left the job in late February 1964, and never returned except to pack up and move to New York. The last entry in his diary was on February 21, 1964. DeLong's pile-driving and work barges were permanently removed from the job on about February 27, 1964.

On March 31, 1964, the state highway engineer certified to the Commission that sufficient cause existed for termination of the contract in that the contractor had violated its provisions in several material respects, including substantial abandonment, as shown by recent, nearly total inactivity, persistent, repeated failure to supply enough workmen for efficient prosecution of the work, failure to correct and replace defective work, persistent disregard of the engineers' instructions to proceed, inability or unwillingness to proceed according to the terms of the contract, as

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[2] This case was subsequently dismissed on the ground of lack of jurisdiction. DeLong Corporation v. Oregon State Highway Com'n, 233 F Supp 7 (D Or 1964), *affirmed* 343 F2d 911 (9th Cir), *cert denied* 382 US 877, 86 S Ct 161, 15 L Ed 2d 119 (1965).

shown in its allegations in the federal court complaint, failure to vigorously prosecute the work, failure to complete Units 1, 2 and 3, and inability to complete Unit 4 by the respective completion dates therefor.

Based thereon, the Commission authorized the termination of the contract. The letter of termination was sent to DeLong and to Travelers Indemnity Company on April 2, 1964.[3] By the terms of the letter, the effective termination date was April 13, 1964. Thereafter the Commission evaluated the work done by DeLong under the contract, determined what remained to be done thereunder and revised the plans and specifications accordingly. On June 24, 1964, the Commission put out for bids its revised proposal for completion of the unfinished work called for by the DeLong contract. Following competitive bidding, a contract was awarded on July 13, 1964, to Raymond International, Inc. The Raymond contract was completed on August 2, 1965, 476 days after the effective date of termination.

We hold that the trial court's finding that the contract was breached by DeLong and validly terminated by the plaintiff effective April 13, 1964, was amply supported by the evidence. We turn now to the remaining issues.

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[3] The parties had agreed, under the terms of the contract, that, upon the engineer's certificate that sufficient cause existed, the Commission could terminate the contractor's employment for various reasons, including persistent or repeated refusal to supply enough workmen for efficient prosecution of the work, persistent disregard of the engineer's instructions, or other substantial violation of any provision of the contract. It was further agreed that, in addition, the Commission could cancel the contract for any willful failure or refusal of the contractor to faithfully perform the contract according to its terms and conditions.

LIQUIDATED DAMAGES

The special provisions of the contract relating to Prosecution and Progress include the following:

"Time for Completion of Work and Liquidated Damages:

"Time is of the essence of the contract. The schedule of completion dates set forth in the special provisions titled 'Dates of Completion' are necessary for the orderly completion of the project. Inasmuch as any delay in the prosecution of the work will inconvenience and be expensive to the traveling public, obstruct traffic, interfere with and delay business and commerce, and increase the cost to the State, it is essential that the work be pressed vigorously to completion.

"The contractor shall complete the work called for under the contract in all parts, units and requirements on the calendar dates specified in an accompanying special provision.

"It is agreed by the parties to the contract that in case all the work called for under the contract in each and all parts, units and requirements is not finished or completed on the calendar dates called for in the contract, damage will be sustained by the State of Oregon, and that it is and will be impracticable and extremely difficult to ascertain and determine the actual damage which the State will sustain in the event of and by reason of such delays; and it is therefore agreed that the contractor will pay to the State of Oregon as liquidated damages or the State, at its option, may deduct from any moneys due or to become due to the contractor from the State, the sum indicated in the schedule below for each and every calendar day elapsed beyond the calendar date specified for

the performance and completion of the work called for in the contract.

Schedule of Liquidated Damages

"Unit of work	*Per Calendar Day Liquidated Damages*
Any one unit	$2,000.00
Any combination of one or more units	2,000.00

"Liquidated damages will be assessed against the unit or combination of any one or more unites [sic], as listed under 'Dates of Completion', having the longest overrun of time in calendar days over the specified completion time.

"• • • • •

"Payment of liquidated damages shall not release the contractor from obligations in respect to the fulfillment of the entire contract, nor shall the payment of such liquidated damages constitute a waiver of the State's right to collect any additional damages which it may sustain by failure of the contractor to carry out the terms of his contract, it being the intention of the parties that said liquidated damages be full and complete payment only for failure of the contractor to complete the work on time."

Concerning liquidated damages the court found:

"Claims had been made for liquidated damages and for damages by the parties up to the time of the cancellation of the contract. The Court hereby finds that there were offsetting, valid delays, occasioned by both parties up until the termination time.

"• • • • •

"However, the Plaintiff is entitled to an additional amount other than stated above, in the form of liquidated damages, occasioned by the delay caused by the

Defendant, for a period of 476 days at $2,000.00 per day, or the amount of $952,000.00."

Defendants, in their ninth assignment of error, challenged the above award of liquidated damages for delay, and plaintiff in its first assignment of error on cross-appeal challenges the failure of the trial court to award it liquidated damages for delays occurring prior to its termination of the contract in the further amount of $330,000. The court found that there were "offsetting, valid delays, occasioned by both parties up until the termination time" and thus denied liquidated damages for delays prior to termination.[4]

We consider first whether plaintiff was entitled to the liquidated damage award for the delay in the completion of work following its termination of the DeLong contract by the state. We recognize initially that in law a provision of a contract is not converted from a penalty to liquidated damages simply by so denominating it.

Restatement, Contracts 552-53, § 339 (1932), states in part:

"(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a

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[4] In its cross-appeal the state also contends, alternatively to its claim for liquidated damages, that its actual damage resulting only from the delay in completion was $1,393,341.24. In its cross-complaint the state alleged that during the 15-month delay it sustained the following losses:

"Loss on Ferry Operations (Schedule A-4)	$435,283.24
Loss on Bridge Toll Operations (Net)	708,058.00
Loss of Washington State Subsidy	250,000.00"

Evidence was received in support of each. The trial court, however, by reason of its finding of "offsetting, valid delays," found it unnecessary to determine what, if any, of the claimed actual losses from delay were established. The state concedes that it is entitled only to one or the other.

contract and does not affect the damages recoverable for the breach, unless

"(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

"(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

"• • • • •

"Comment on Subsection (1):

"• • • • •

"c. Where the amount of loss or harm that has been caused by a breach is uncertain and difficult of estimation in money, experience has shown that the estimate of a court or jury is no more likely to be exact compensation than is the advance estimate of the parties themselves. Further, the enforcement of such agreements saves the time of courts, juries, parties, and witnesses and reduces the expense of litigation. In such cases, if it is not shown that the principle of compensation has been disregarded, the liquidation by the parties is made effective.

"• • • • •

In Secord v. Portland Shopping News, 126 Or 218, 223-25, 269 P 228 (1928), the court, after discussing the considerations determinative of the difference between a liquidated damage provision and a penalty, said:

"• • • In determining whether any particular stipulation is to be regarded as one fixing a penalty, or whether it really liquidates the damages, the adjudicated cases present us with an abundance of rules to guide our determination. For instance, the situation must be appraised as of the time when the contract was effected, and not as it appears at some other time:

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Baltimore Bridge Co. v. *United R. etc. Co.*, 125 Md. 208 (93 Atl. 420). It is well settled that in the determination of the problem the court should consider all of the circumstances which surrounded the parties, together with the ease or difficulty of measuring the breach in damages. A comparison of the size of the stipulated sum not only with the value of the subject matter of the contracts, but also with the probable consequences of the breach as they appeared when the contract was executed may be helpful: 17 C. J., Damages, § 234. Mr. Justice BEAN in *Salem* v. *Anson*, 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169), well states another helpful rule in language which has been much quoted:

"'* * * When the actual damages in case of a breach of the contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract shows, or the circumstances under which it was made indicate, a contrary intention of the parties, or it so manifestly exceeds the actual injury suffered as to be unconscionable * * * Where the damages are uncertain and speculative, the presumption ordinarily is that the parties have taken that into consideration in making the contract, and have agreed upon a definite sum to be paid in case of a breach, in order to put the question beyond dispute and controversy and to avoid the difficulty of proving actual damages.'

"* * * * *

"It is also to be noticed that some of the former antipathy to these provisions which inclined courts at times, to construe them as stipulations for a penalty is modulating. Thus Mr. Justice CLARKE on behalf of the federal Supreme Court in *Wise* v. *United States*,

249 U.S. 361 (63 L. Ed. 647, 39 Sup. Ct. Rep. 303), expressed the changed attitude thus:

> " 'The later rule, however, is to look with candor, if not with favor, upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts and because adjusting in advance, and amicably, matters the settlement of which through courts often involve difficulty, uncertaintly, delay and expense.' "

In Priebe & Sons v. United States, 332 US 407, 411-12, 68 S Ct 123, 92 L Ed 32 (1947), the United States Supreme Court said:

> "Today the law does not look with disfavor upon 'liquidated damages' provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. [Citations omitted.] They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. [Citations omitted.] And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract. [Citation omitted.]"

See also, 5 Corbin, Contracts 402, 407-09, § 1072 (1964); 5 Williston, Contracts 733-36, § 785 (3d ed 1961); 35 Ill L Rev 74 (1941); 52 Harv L Rev 160 (1939).

Here the difficulty inherent in determining and proving actual damages for delay prior to completion of the bridge is apparent,[5] as for example in determining the net loss of

[5] See n. 4.

revenue which would have been derived had the bridge been in operation. This is particularly true when the validity of the liquidated damage provision must be determined as of the time the contract was entered into, rather than at the time of completion. Secord v. Portland Shopping News, supra; Priebe & Sons v. United States, supra. That the amount of liquidated damages claimed does not unconscionably exceed the actual injury suffered is seen from the testimony relating to the claimed losses from the ferry operation, absence of toll revenues, and deprivation of the Washington state subsidy.

We think it clear that the challenged provision was correctly viewed as one for liquidated damages, and not as a penalty, "amercement" or forfeiture.

The defendants rely primarily on the case of Rainier v. Masters, 79 Or 534, 154 P 426, 155 P 1197, 1916E LRA 1175 (1916), in support of their contention that no liquidated damages can be here allowed. In *Rainier,* the city of Rainier brought an action against the contractor and surety on a bond to secure performance of a sewer construction contract that stipulated if the required work was not completed by September 14, 1909, the defendants would pay liquidated damages of $10 per day for each day beyond the date specified for completion. These liquidated damages were to run from the date of required completion to the date of actual completion. The complaint alleged that the contractor began performance, but the contract was never completed. At the time of the trial the city had taken no steps toward completion of the project, although more than four years had passed since work had ceased upon it. The city sought as its sole claim for damages the enforcement of the $10 per day clause. In rejecting this contention the court said:

> "The complaint declares an *abandonment of the contract* after the commencement of performance. At what stage of the work this occurred is not stated.

The effort of the plaintiff is to apply to such a breach the stipulation for the allowance of $10 a day for delay in completing the undertaking. We note that by the provisions of the agreement itself this *per diem* forfeit is not to be applied for an indefinite period in the discretion of the plaintiff. *On the contrary, the stipulation is limited to time 'which should elapse after the expired time to date of completion.'* In other words, the term for which the amercement is to be allowed is bounded in the beginning by September 15, 1909, and is ended at the completion of the improvement. The pleading fails to disclose such latter date. Indeed, the plaintiff virtually states that there is no such date in that it says the enterprise was never finished. The manifest intention of the parties was, not to apply this clause to general damages, but only to mere delay. The stipulation on that point contemplates a fulfillment of the contract although belated, and not a breach by abandonment.

"* * * * *

"* * * It was not the intention of the parties, as manifested by their agreement, to create a perpetuity of *per diem* forfeiture bounded only by the statute of limitations or the rapacity of the plaintiff. In general, damages are limited to compensation to the end that the injured party may be made whole, and it is only where it is difficult or impossible to calculate the actual damage that the previous stipulation of the parties for liquidated damages will be enforced. * * * The complaint does not portray any condition to which the drastic remedy of liquidated damages is applicable. *It was at least the duty of the pleader to show a completion of the contract, and thus establish the termination of the period of forfeiture.* Failing to do so, he has not stated in any event a breach to which can be applied the measure of damages he invokes. * * *" (Emphasis supplied.) 79 Or at 537-39.

Here, however, unlike *Rainier*, the plaintiff did proceed to complete the work required under the DeLong contract. Promptly after its termination of the contract, the state, following preparation of the necessary documents, called for bids to complete the work called for in the DeLong contract, and on July 13, 1964, awarded the contract to Raymond International, Inc., for $2,434,926.69. The court's award of general damages in the amount of $1,719,864.19 reflects its findings of the difference between the DeLong contract price and the actual cost to the state of completing the agreed work, with certain adjustments not here relevant.

In *Rainier*, the complaint alleged "an abandonment [6] of the contract." Here, however, not only was the completion of the work, though by a different contractor, alleged and proved, but extensive evidence received concerning the actual losses of the plaintiff incurred therein, exclusive of the challenged liquidated damages.

Furthermore, in *Rainier* it is obvious that the court concluded the city had also abandoned the project,[7] the exact opposite of the situation here, for it said:

> "* * * It was not the intention of the parties, as manifested by their agreement, to create a perpetuity

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[6] 5 Williston, Contracts 733, 734, § 785 (3d ed 1961):

> "If the contract is abandoned, the agreed damages are, of course, not recoverable, since mutual abandonment of the contract is tantamount to a tacit recission. In speaking of abandonment, however, courts sometimes use the words 'abandoned the contract' when in reality they mean that the contractor has abandoned work on the project."

[7] See Comment, *Applicability of Liquidated Damages Clause to Delays Where Building Contractor Abandons*, 35 Ill L Rev 74, 76, n. 9 (1941):

> "City of Rainier v. Masters, 79 Ore. 534, 154 Pac. 426 (1916) (damages for delay denied, the owner having taken no steps toward completion at the time of trial which was

> of *per diem* forfeiture bounded only by the statute of limitations or the rapacity of the plaintiff. * * *" 79 Or at 539.

Here the intention of the parties as set forth in the contract was not only that the project be completed promptly as it was, but that the provision for liquidated damages was inserted to compensate only for delay in that completion.[8]

In Comment, *Applicability of Liquidated Damages Clause to Delays Where Building Contractor Abandons*, 35 Ill L Rev 74, 76 (1941), the writer points out:

> "Satisfaction of the fundamental purpose of the liquidated damages clause requires in all kinds of delay a construction of the clause to allow recovery according to the stipulated rate, since all delays operate to defeat the interest of the owner in attaining a timely completion. Holding the clause inapplicable to delays in case of abandonment results in giving the contractor an opportunity to avoid his contractual obligations. Such a view not only denies recovery for delays which would appear were the contractor to complete, but even denies recovery for delays which have 'accrued' between the date set for completion and the date of abandonment. Whenever the contractor can foresee his inability to complete on time or when he has passed the completion date, he may determine that his probable

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four years after the abandonment); Moses v. Antuono, 56 Fla. 499, 47 So. 926 (1908); Mason v. Consolidated Co., 99 Okla., 32, 225 Pac. 381 (1924). * * * Courts properly have refused to permit recovery for delay when the construction is never completed but it does not follow that the clauses should not be applied where the work ultimately is completed within a reasonable time. In the latter instance the exact amount of delay can be measured and the possibility of the contractor's *ad infinitum* liability is removed."

[8] See provisions of contract, supra.

liability for delay plus the out-of-pocket expense to himself of completing will equal or exceed the cost of getting the project completed by another. It will then be unprofitable for him to continue and he may abandon the job. * * *"

We believe that the trial court correctly concluded since this project was completed without unreasonable or unnecessary delay that there was not only no abandonment within the rule announced in *Rainier*, but rather that its correct application to the facts here is fully consistent with the *Rainier* holding.

In May v. Chicago Insurance Co., supra, the court said:

"As a general rule, the construction of a contract is a question for the court and is treated as a matter of law. * * * In *Libby Creek Logging, Inc.* v. *Johnson*, 225 Or 336, 339, 358 P2d 491 (1960), we said:

"'If the provisions of the contract are plain and unambiguous, it is the function of the court to interpret the contract and declare its legal effect. (Citing cases.)

"'If the language of the contract is ambiguous, or if technical words, terms of art, or local phrases are used, evidence showing the meaning or interpretation of the contract may be admitted. In such event, the jury should determine the intention of the parties. (Citing cases.)'" 93 Adv Sh at 852-53.

The provisions of the contract relating to liquidated damages were in our view plain and unambiguous. But whether so viewed, since the trial judge sat here as the trier of fact as well as the determiner of law, we conclude that he correctly determined that the liquidated damages provision was here applicable. Since his finding that the defendants were chargeable with delay aggregating 476 cal-

endar days is supported by substantial evidence, his award of $952,000 as liquidated damages for that delay is affirmed.

In plaintiff's cross-appeal it asserts the trial court erred in not awarding it liquidated damages for the period between breach and termination. The trial court found that there were "offsetting, valid delays" during this period and concluded that plaintiff was not entitled to liquidated damages for the 165 days claimed as elapsing between breach and termination. It is sufficient without more to point out that plaintiff authorized additional work orders to correct problems resulting from scour for which it agreed to pay DeLong more than $200,000 in excess of the contract price. We think the trial court's denial of the cross-appeal is supported by substantial evidence.

Attorney Fees

Defendants, in their 12th and 13th assignments of error, assert that the trial court improperly allowed $250,000 in attorneys' fees to plaintiff against the defendant Travelers Indemnity Company.

The general rule is that attorney fees are not recoverable except pursuant to a contract, express or implied, or unless provided for by statute. State v. Jamison, 251 Or 114, 120, 444 P2d 15, 444 P2d 1005 (1968); State Land Board v. Sovenko, 202 Or 571, 574, 277 P2d 781 (1954); Garrett v. Hunt, 117 Or 673, 244 P 82, 245 P 321 (1926). Here neither the contract nor the performance bond expressly refers to attorney fees. The parties agree that the plaintiff's right, if any, to attorney fees depends upon ORS 743.114(1):

> "If settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender

made by the defendant in such action, then the plaintiff shall recover as part of his judgment such additional sum as the court may adjudge to be reasonable as attorney fees."

The policy behind this statute, as explained in Heis v. Allstate Insurance Co., 248 Or 636, 436 P2d 550 (1968), is

> "* * * to encourage the settlement of claims and to discourage the unreasonable rejection of claims by insurers. If the insurer, in rejecting a claim or in tendering less than is claimed, relies upon a mistaken theory of its legal liability, the plaintiff is entitled to a reasonable attorney's fee if he recovers more than the tender." 248 Or at 643-44.

In State v. Claypool, 145 Or 615, 28 P2d 882 (1934), the court, in holding that the filing of the complaint was itself a sufficient demand where the contract did not require that a formal proof of loss be filed under ORS 743.114, stated:

> "Defendant contends that the allowance to the state of attorney's fees was improper. Section 46-134, Oregon Code 1930, authorizes the allowance of attorney's fees upon all policies of insurance if settlement is not made within six months after date that proof of loss is filed with the company. It further provides that, if the defendant tenders any amount into court and no greater amount is recovered in the action, then attorney's fees shall not be allowed. There was no tender made and there is no provision in the policy requiring proof of loss as in ordinary fire insurance cases. The commencement of the action is equivalent to demand for payment, whether previously made or not and this we think renders the statute applicable and entitles the plaintiff to attorney's fees in this action. The complaint was filed on April 11, 1932, but the judgment was not entered until June 7, 1933, more than six months after the commencement of this action. This,

we think, brought the case within the intendment of the statute under the doctrine followed and approved in *Murray* v. *Firemen's Ins. Co.*, 121 Or. 165 (254 P. 817); *Goodspeed* v. *Duby*, 131 Or. 275 (283 P. 6); *School Dist.* v. *New Amsterdam Cas. Co.*, 132 Or. 673 (288 P. 196); *Dolan* v. *Continental Cas. Co.*, 133 Or 252 (289 P. 1057)." 145 Or at 621-22.

See also, New York Life Insurance Company v. Lee, 232 F2d 811 (9th Cir. 1956).

As this action is by plaintiff to, *inter alia*, recover on an indemnity insurance policy issued by defendant Travelers, its declaratory nature does not prevent ORS 743.114 from becoming operative. Williams v. Stockman's Life Ins., 250 Or 160, 172, 441 P2d 608 (1968); *cf.* Hollopeter v. Oreg. Mutual Ins., 255 Or 73, 464 P2d 316 (1970); First National Bank v. Malady, 242 Or 353, 360, 408 P2d 724 (1966).

The complaint alleges:

"Plaintiff afforded to Travelers, as surety for DeLong, ample and reasonable opportunity to complete the work remaining to be done after said Contract No. 6124 was terminated, but Travelers for more than six months prior to the filing of this suit failed to do so. That plaintiff is entitled to recover $250,000.00, all of which is reasonable, as attorney fees from the defendant Travelers."

We hold that plaintiff sufficiently pleaded its right to recover attorney fees from Travelers pursuant to ORS 743.114. *See*, Staff Jennings, Inc. v. Fireman's Fund Insurance Company, 218 F Supp 112, 114 (D Or 1962). Additionally we note that plaintiff addressed the notice of termination of April 2, 1964, to DeLong and to Travelers jointly. The notice included the statement:

"This is to further advise that the State will henceforth look to Traveler's Indemnity Company for com-

> pletion of the contract according to its terms, in accordance with its obligations as surety. If said surety fails to promptly undertake the satisfactory completion of the work, the State will do so, either by means of its own forces or by contract, as the Commission may deem appropriate. In any event, the State will look to the DeLong Corporation and Traveler's Indemnity Company for recovery of the damages sustained by the State by reason of the contractor's violation of the provisions of the contract."

Thus, we hold that Travelers had full knowledge of plaintiff's intention to hold it liable for performance of the contract including damages, and that the complaint itself constituted a sufficient proof of loss within ORS 743.114(1).

Defendant Travelers contends that since there is no specific amount sought in plaintiff's prayer for relief, Travelers was unable to know how much to tender to plaintiff, and thus plaintiff should not be permitted to avail itself of ORS 743.114 by way of the rule laid down in *Claypool*. This argument is without merit, as paragraphs XI, XII and XIII of this complaint all set forth specific amounts of money damages alleged to be owing to plaintiff because of DeLong's breach of contract. There are no provisions in the statutes or in Travelers' bond relating to the specificity with which the plaintiff must set forth its proof of loss. Travelers was entitled to sufficient information to form a reasonable estimate of its liability. The complaint sufficiently advised Travelers of the amounts claimed for breach of the contract.

In Heis v. Allstate Insurance Co., 248 Or 636, 644-45, 436 P2d 550 (1968), the court said:

> "* * * There are no provisions in the statutes or in the insurance contract relating to the specificity with which the insured must set forth his proof of loss. The insurer is entitled to sufficient information to form

a reasonable estimate of its liability. This does not mean that the insured's claim is barred if the proof of loss originally filed does not contain sufficient information to make this estimate. If the proof of loss is ambiguous, the insurer should make a reasonable effort to resolve the ambiguity. Defendant's own policy indicates that it may be necessary for it to investigate a claim for the purpose of testing its validity. Thus, the policy provides that the insured 'shall after such request from Allstate execute authorization to enable it to obtain medical reports and copies of records.'

"If defendant's contention is that plaintiff's proof of loss was so uncertain that defendant was unable to determine the character of plaintiff's claim, then defendant should have requested plaintiff to make her claim more definite and certain. If defendant's contention is that the expenses incurred were adequately described in the proof of loss but inadequately segregated then, as we have explained above, defendant was mistaken, as was the trial court, with respect to its liability, and consequently the proof of loss was not inadequate since it presented a claim which entitled plaintiff to recover."

Furthermore, Travelers does not here contend that it at at any time tendered to plaintiff any amount whatsoever in response to the allegations of the complaint.

Accordingly we conclude as more than six months passed between the commencement of this action and final judgment, the plaintiff is entitled to recover reasonable attorney fees from defendant Travelers. State v. Claypool, supra, 145 Or at 622.

Since there was no contractual or statutory authority permitting recovery of reasonable attorney fees from defendant DeLong, none are recoverable. State v. Jamison,

supra. We find no difficulty in the fact that, as a consequence of differing liabilities regarding attorney fees, the two defendants are obligated to plaintiff in different amounts. Esselstyn v. Casteel, 205 Or 344, 369-70, 286 P2d 665, 288 P2d 214, 288 P2d 215 (1955). The assignments of error do not challenge the amount of the award for attorney fees. We do not therefore consider it.

Remaining Assignments of Error

Assignments of error two through five encompass challenges to the accuracy of approximately 50 evidentiary rulings. The second assignment challenges the court's denial of a motion to strike certain testimony of Glen S. Paxson. Mr. Paxson, a registered civil engineer, was employed by the plaintiff for over 43 years. He served in steadily advancing capacities including that of state bridge engineer until in 1961 he became the deputy state highway engineer, which position he occupied during the time this contract was entered into. He retired January 1, 1963, and thereafter served the plaintiff in an advisory capacity in part in connection with the Astoria bridge. Assignment of error three, part seven, challenges the admissibility of Exhibits 400 and 403. Since the former depends in part upon the latter, we consider them together.

During the trial Robert Pool testified on behalf of the state. He was a registered professional engineer employed by plaintiff as an assistant resident engineer at the job site throughout the project. He was present as the representative of the project engineer, Mr. Ellison, during both the pouring and the dewatering of the seals at Pier 169. Exhibits 400 and 403 were identified and introduced during his testimony. These exhibits were intended to reflect the slope of the concrete as it was being poured within both the upstream and downstream seals at Pier 169. Attached to each exhibit was a series of sheets reflecting the changing elevations of the concrete as it was poured. These

measurements were made periodically by a team of fou engineers throughout each pour. Two of these men wer employed by DeLong and two by plaintiff. Mr. Pool ac tually participated in the process.

The two exhibits in effect were profiles of the seal pour at Pier 169. From the periodic recordings thus obtaine and attached as back up for each exhibit, there was pre pared a summary of the recorded data in the form of profile extending the recorded data to show as accurate as was reasonably possible the progress of the concret pour taking place more than 50 feet below the surface o a rapidly flowing, great and murky river.

The defendants objected during Mr. Pool's testimony t the admission of Exhibits 400 and 403 on grounds of "ma teriality and relevance," but stipulated as to their au thenticity. At that time counsel stated:

> "* * * I will stipulate now I have no objections t the authenticity.
>
> "* * * * *
>
> "MR. RHOTEN [counsel for plaintiff]: I expect ther to show the contours of the concrete at various time during the course of the pier—the course of pourin the seals.
>
> "MR. RAND [counsel for DeLong]: Your Honor, i Mr. Paxson testifies to such a thing, and he is a prope witness to so testify, and he testified he had somethin to do with it, and then these are offered, they migh fit in the context of his testimony. A foundation ma be laid for it, and they might be connected up."

Subsequently, Mr. Paxson, over objection, testified, base in part upon Exhibits 400 and 403, that the seals at Pie 169 were defective. In expressing his opinion concernin why those seals were defective, Mr. Paxson relied in par upon those exhibits. This constitutes the chief basis o

defendant's claim that the testimony of Mr. Paxson should have been stricken.

At the conclusion of plaintiff's case-in-chief, defendants moved to strike Exhibits 400 and 403 as "irrelevant and immaterial" and "in no way connected with the issues in plaintiff's case in chief." The motion also sought to strike Mr. Paxson's testimony because he considered Exhibits 400 and 403 in arriving at his conclusions concerning the seals. Both motions were denied.

The rulings were correct. The challenged exhibits were relevant to the establishment of the rate of pour of the seals and to compliance by DeLong with the provisions of the contract concerning the pouring of the seals. The exhibits were properly identified and were made by qualified personnel of both parties acting together in the regular course of the work at or about the time of the conditions noted. The court correctly concluded that the sources of information, method and time of preparation justified their admission. ORS 41.690.

We note that a number of the asserted errors, as in Exhibits 400 and 403, involve the introduction into evidence of summaries made from other writings, records or documents. It is difficult to imagine any case where summaries or other graphic representations of relevant material would be of greater aid to the court than in the case at bar, involving as it did an immense volume of both oral and documentary evidence. ORS 41.640(1)(e) provides:

> "There shall be no evidence of the contents of a writing, other than the writing itself, except:
>
> "* * * * *
>
> "(e) When the originals consist of numerous accounts, or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

In Note and Comment, *Evidence—Best Evidence Rule—The Law in Oregon,* 41 OR L Rev 138 (1963), the author states at 148:

> "Or. Rev. Stat. sec. 41.640(1)(e) provides that, where the evidence is detailed and its examination in court would result in 'great loss of time' and where only 'the general result of the whole' is sought, other evidence of the contents of the writings may be received by the court. Such was the common-law rule. * * *"

The Oregon Lawyer's Trial Book, Summaries of Records § 13.7 (1967), summarizes the rule:

> "Secondary evidence is admissible when the originals consist of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. ORS 41.640(1)(e).
>
> "Summaries are permitted when the originals are voluminous or complicated and the summary is the general result of the whole. McCormick on Evidence, 411 (1954). * * *"

See, Smith v. Abel, 211 Or 571, 316 P2d 793 (1957); Hubble v. Hubble, 130 Or 177, 279 P 550 (1929); Scott v. Astoria Railroad Co., 43 Or 26, 72 P 594, 99 Am St R 710, 62 LRA 543 (1903); McCormick, Evidence 411, § 199 (1954). When, as here, the challenged exhibits are taken from other evidence, material or documents available to both parties for examination and are consistent with the purposes of the statute, they are clearly admissible. Our attention is directed to no instance where the trial judge abused his discretion in the receipt of such material.

It would greatly prolong this opinion to examine here each of the remaining challenges to the court's rulings on

evidence. Our examination of each satisfies us that they are without merit.

In the seventh assignment of error defendants contend the findings of the trial court do not comply with ORS 17.431. Portions of those findings, deemed relevant to this opinion, have been previously quoted. Defendants assert generally they contain "only intermingled conclusions of law, of which only some were supported by vague and ambiguous findings of fact."[9] We note that defendants filed no motion as required by ORS 17.431(1) for special findings of fact prior to commencement of trial. *See*, Collins v. Lantz,. Vickery, 244 Or 62, 64, n 1, 415 P2d 763 (1966); Ewauna Box Co. v. Weyerhaeuser, 198 Or 360, 361, 255 P2d 121 (1953). They now contend that because the plaintiff did, they were not required to. We disagree. The purpose of the statute is to advise the trial court of the demands of each party in advance of trial. In a long and complicated trial involving a myriad of fact issues,[10] few of which are likely ultimately to prove decisive, the burden placed upon the trial court by the statute is a heavy one. A party seeking its application must himself comply with it.

---

[9] In Wells v. Davis, 91 Adv Sh 1851, 1853-54, 258 Or 93, 480 P2d 699 (1971), the Supreme Court said:

> "Findings of fact can assume any form the trial court desires as long as the court's intent to accord to its statements the character of findings of fact can be determined. In *State Highway Com. v. Brassfield*, 228 Or 145, 149, 363 P2d 1075 (1961), we stated that a letter from the trial court to counsel could constitute findings of fact if the trial court had indicated that was its intention."

[10] Here defendants filed objections to the court's findings and moved to have the court adopt special findings of fact and conclusions of law submitted by them pursuant to ORS 17.431(3). DeLong's requested findings of fact alone are 194 in number and occupy 35 pages in the abstract. Travelers sought a dozen additional findings. All were denied.

Additionally, defendants in their final assignment of error challenge the court's overruling of their objections to its findings and conclusions and its denial of their request for voluminous special findings of facts and conclusions of law. (*See*, n 10.) They contend the court in its letter opinion, subsequently adopted by it as its findings of fact and conclusions of law, did not expressly rule on each of more than 200 specific findings of fact requested between them.

In Howard v. Klamath County, 188 Or 205, 215, 215 P2d 362 (1950), the Supreme Court said:

> "The provision[s] of O.C.L.A., § 5-502 [now, in amended form, ORS 17.431] authorize any party litigant to object to findings made by the trial court and to request other different or additional fiindings, but notwithstanding the request of litigant for special findings, it rests in the discretion of the trial court to determine whether the findings shall be general or special. *Larsen* v. *Martin*, supra. *If the trial court elects to make special findings, it is not bound to make them upon every matter requested by a litigant:*
>
> > "'* * * special finding is a "statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest." [citing cases] A special finding of facts, as said in the case last cited, "consists of a statement of the ultimate conclusions of the trial court upon issues of fact raised by the pleadings." * * *' Larsen v. Martin, supra.
>
> "The objection commonly urged is that the findings do not support the judgment. In the case at bar, however, they exactly support the judgment and we think that findings were made upon all of the material issues. * * *" (Emphasis supplied.)

See also, Leo v. Heller, 255 Or 390, 392, 467, P2d 439 (1970).

We think the trial court made findings concerning every material fact necessary to its determination of the issues before it and to support its conclusions of law based thereon. The law requires no more. These findings are amply supported by the evidence.

Discussion of the remaining assignments of error, whether on the appeal or on the cross-appeal, would add only prolixity to this opinion. We conclude that they are without merit.

The judgment is affirmed.

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APR 19
MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RESPONDENT respectfully prays that petitioner's petition for a Writ of Certiorari to the Supreme Court of the State of Oregon be denied.

JURISDICTION

Respondent denies that this Court has jurisdiction under 28 U.S.C. § 1257 (3), and contends it should not review the State court judgments below because, in summary: (1) No substantial federal question is involved; (2) no constitutional issues of due process, or otherwise, were timely raised, preserved or presented in the State courts, and (3) the decision below could have and did rest on substantial and sufficient state grounds. These points are more fully discussed below.

QUESTIONS PRESENTED

Respondent believes the statement of "Questions Presented" in the Petition (pp. 2, 3) is argumentative, misleading and inaccurate. From the petition itself, from the portions of the record certified in this proceeding, and from the authorities; it will be apparent that no valid, substantial issue of due process, or any other federal question, exists. Specific, factual flaws in each of Petitioners' four "Questions Presented" include the following:

1. Respondent, the State of Oregon by and through its State Highway Commission, knew nothing of the supposed "relationship." There was no concurrent or continuing "relationship", but only a one-time, arm's length transaction whereby the Trial Judge and his partners purchased land from the State Board of Control, a separate and distinct agency of the State of Oregon. The sale was by sealed bid pursuant to a widely advertised offer to sell. The transaction was concluded and a matter of public record months before this case was assigned to the judge for trial. Petitioners admit that the transaction itself was fair and regular (Pet. p. 7, n. 3);

Petitioners' attempt to disqualify the Trial Judge came more than four years after the trial, nearly eight months after the Court of Appeals of the State of Oregon affirmed the judgment, and after the initial denial of review by the Supreme Court of the State of Oregon.

2. There was no "specific ruling discrediting all of the evidence of Petitioners." In his written opinion, the Trial Judge noted the failure of defendants to call potential witnesses including Colonel DeLong, who was the principal officer of Petitioner DeLong

Corporation and project manager during most of the events in question. The Court noted that failure was:

> ". . . in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution."

The Court's comment was specifically assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

3. The trial judge did not enter "a declaratory Judgment finding Petitioners liable for any damage due to delay incurred by a third party . . ." There was no attempt to adjudicate that anyone was liable to a third party. The Declaratory Judgment entered May 23, 1969 provided:

> "6. As between plaintiff and defendants, any and all delay to United States Steel Corporation, the contractor for the steel superstructure erected upon the substructures which were the subject of the contract between plaintiff and defendant DeLong Corporation, which occurred from and after April 13, 1964, was caused by the fault of defendant DeLong Corporation;"

Such declaration was specificially assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

4. Respondent categorically denies that any of its exhibits were "fraudulently offered and substantially altered." It has not been and cannot be demonstrated that the trial court materially relied on the challenged exhibits. The authorship and identity of the same exhibits were questioned at the trial. Their admission in evidence was specifically assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

STATEMENT OF CASE

Respondent disagrees with much of petitioners' statement of the case. It is argumentative and in many respects inaccurate and misleading.

By way of background, this case arose from a contract executed on June 29, 1962 between petitioner DeLong Corporation and respondent. Petitioner, The Travelers Indemnity Company furnished the construction bond covering the contract. Under the contract, DeLong was obligated to construct a major portion of the substructure of a bridge across the estuary of the Columbia River at Astoria, Oregon.

In April, 1964, because of failures of DeLong to perform, respondent terminated the contract and subsequently relet the contract to Raymond International, who completed the work.

Petitioners brought an action on the contract against respondent in the U.S. District Court for Oregon. That action was dismissed because of lack of federal jurisdiction in August, 1964. *DeLong Corporation v. Oregon State Highway Commission*, 233 F. Supp. 7, affirmed 343 F.2d 911, cert. denied 382 U.S. 877.

Respondent, on August 30, 1965, by and through its Highway Commission, filed its complaint against petitioners in the Circuit Court of the State of Oregon for the County of Marion.

There was extensive preliminary legal maneuvering with resultant delays. During this period the Astoria Bridge was completed and opened to traffic.

Beginning in November, 1967, there was approximately four and one-half months of intensive discovery and depositions. Petitioners examined voluminous records, diaries, correspondence, maps, plans and other documents from respondent's files. Petitioners deposed in minute detail numerous engineers and employes of respondent. Some individual depositions took two or three days or more.

Just before trial the case was assigned to the Honorable George A. Jones, Circuit Judge. The trial commenced on March 18, 1968 and ran through September 1968. There were over 900 exhibits and over 9,000 pages of testimony.

On January 31, 1969, the trial court, by memorandum opinion, entered its findings in favor of respondent. That opinion is set out in the petition herein (Pet. pp 3a-7a). Judgment was entered on May 23, 1969.

Petitioners appealed from the judgment. The case moved through the Oregon Court of Appeals and the Oregon Supreme Court at a "snails pace". Petitioners obtained extensions of time at virtually every procedural step. On December 12, 1972, the Oregon Supreme Court entered its final order in this case refusing to grant defendants' (Petitioners here) "Supplemental Petition for Reconsideration of Petition for Review."

Thereafter, petitioners commenced this proceeding. They also filed in the U.S. District Court for Oregon a separate equitable proceeding to permanently enjoin the enforcement of respondent's state Court Judgment, and

also asked for a temporary injunction to restrain enforcement of said judgment pending litigation. Petitioners have appealed to the Ninth Circuit from the trial Court's order denying the temporary injunctions.

In their statement of the case petitioners inaccurately portray the circumstances of the land transaction between the Oregon Board of Control and the Trial Judge and his partners.

The Oregon Board of Control is made up of the Governor, the Secretary of State and the State Treasurer, the three principle elected officers in Oregon. Among its duties, the Board administered the State's penal and mental institutions, as well as the deaf and blind schools and the State T.B. Hospital.[1] The Board, on the advice of its staff and its "Land Use Committee" decided to sell the Colony Farm which had become surplus to the needs in the State. See Affidavit of Carl A. Haugerud (Infra pp. 3-A–5-A).

An appraisal was obtained from the Oregon Department of Veterans' Affairs. The staff appraisal dated July 28, 1965, reported the value of the Colony Farm at $175,000. See Affidavit of appraiser Don J. Mason, (Infra pp. 6-A–7-A).

Between August 17, 1965 and February 16, 1966, after advertising in newspapers in Los Angeles and San Fran-

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[1]The functions of the Board of Control are entirely different and separate from those of the Highway Commission. *DeLong Corporation v. Oregon State Highway Commission, supra,* 233 F. Supp. 7 (D.C. Or. 1964) contains a good discussion of the history, composition and functions of the Highway Commission. *Potter v. McCall,* 433 F.2d 1087 (9th Cir. 1970) discusses to a lesser degree the functions of the Board of Control. Also see Affidavit of Carl A. Haugerud (Infra pp 3-A–5-A).

cisco, California, Portland, Salem and Dallas, Oregon and in farm papers in five Northwestern States; the Board of Control on three occasions attempted to sell the Colony Farm. The minimum price on all occasions was $175,000, but the terms of payment were liberalized on the subsequent attempts and sealed bids were again solicited.

No bids were received on the first two occasions, and only one bid by Green Villa Farms on the third occasion. On February 16, 1966, the Colony Farm was sold on Land Sale contract to that company for $175,000. In July, 1967, the State was paid off in full on its contract. (Pet p. 21a) Also see Affidavit of Carl A. Haugerud, (Infra pp. 3-A–5-A).

Contrary to statements in petitioners' brief, Judge Jones had nothing whatsoever to do with this case until it was assigned to him for trial during the first or second week in March, 1968.

Presiding Judge Val D. Sloper presided over all preliminary legal matters prior to trial that commenced on March 18, 1968. Because the attorneys estimated that the trial would last four to six weeks or longer, Judge Sloper could not personally be involved in the trial of the case. He assigned it to Judge Jones for trial. See Affidavit of Honorable Val D. Sloper (Infra pp. 1-A–2-A).[2]

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[2] The affidavits of Judge Sloper, Don J. Mason and Carl A. Haugerud are reproduced in the Appendix from the record in the related case, *DeLong v. Hon. Lee Johnson*, Civil Case Number 73-20, U.S. District Court for Oregon.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I. No Substantial Federal Question is Involved.

It is believed apparent that "Questions Presented" Nos. 2, 3 and 4, as stated by petitioners (Pet., pp. 2, 3) do not involve any constitutional issues. These deal, respectively, with (2) the right of a state judge, sitting as the trier of fact, to weigh the evidence in accordance with recognized rules; (3) the scope of declaratory relief between the immediate parties to a declaratory action tried in State courts under State law, and (4) the application of ordinary rules of evidence in a State court civil action. All three are basically local matters for the state courts and the state legislatures.

Each of these asserted errors was fully submitted to the State appellate courts, duly considered, and rejected. No constitutional grounds were urged there. Documentation of these statements as to each of petitioners four questions will be hereinafter set out.

Petitioners' Question No. 1, relating to the trial judge's non-disclosure of a supposed "relationship" with Respondent, has been *artfully but unconvincingly contrived* to suggest that this Court should perceive and rule upon an issue of constitutional magniture, relating to the right to a trial before an impartial tribunal. No authorities have been cited which suggest that the actual facts of this case give rise to a constitutional issue. The merits of the claim hereinafter discussed discloses that no substantial issue, either state *or* federal exists.

Petitioners objection to the supposed "relationship" was first raised in Petitioners' "Supplemental Petition for Reconsideration of Petition for Review, filed in the Oregon Supreme Court on December 1, 1972. To the extent that specific grounds were there assigned, it appears possibly that Petitioners' intended to rely upon both state and federal grounds.[2]

This Court has recognized that a constitutional issue first raised in a petition for rehearing in a state appellate court comes too late, and such issue will not be reviewed here. *Hanson v. Denckla*, 357 U.S. 234, 243, 244, reh. den. 358 U.S. 858 (1958); *Radio Station WOW vs. Johnson*, 326 U.S. 120, 128 (1945).

Here, the so-called constitutional issue relating to the Judge did not surface until after the State Court of Appeals affirmed the trial court judgment and denied a rehearing, the State Supreme Court denied a petition for review, and the petitioners filed a petition for reconsideration. Only then, in a last-ditch "Supplemental Petition for Reconsideration of Petition for Review" did petitioners suggest that the undisclosed "relationship"

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[2] For example, they urged: "It [the trial courts failure to disclose] thus vitiated the entire trial proceedings *and* such failure effectively deprived petitioners of the exercise of their sacred and constitutional right to be assured of a fair and impartial judge." (Supp. Pet., p 7, emphasis added.) "The law in this State and the interpretation of the constitutional right to a fair and impartial trial and due process of law by this Court and the Supreme Court of the United States would have required Judge Jones to grant Counsel's Motion [to disqualify the Judge]." (Supp. Pet., P. 8.) After citing the Code of Justinian and various Oregon decisions and statutes, petitioners urged that the trial judge ". . . would have been disqualified by the filing of the affidavits of prejudice, as a matter of law." (Supp. Pet., P. 10.)

had, more than four years earlier, deprived them of due process.

II. **No Constitutional Issue was Timely Raised, Preserved or Ruled upon in the State Courts.**

The petition for Certiorari herein does not state when in the trial court or in the appellate court, or how the supposed federal questions were raised, as required by Rule 23 (1)(f) of the Rules of this Court. Such omission, we suggest, was not inadvertent, but necessary because in fact they failed to raise any such questions in the trial court, in their lengthy (325 page) Appellant's Brief in the State Court of Appeals, or even in their Reply Brief in that Court.

For the convenience of this Court, we have reproduced in the Appendix (Infra, pp 16-A–26-A) several pages from the Table of Contents and the entire Index of Authorities from the Appellants' Abstract of Record and Brief, filed by Petitioners in the State Court of Appeals. *None of the 17 Assignments of Error, as there summarized, raise any issue of "due process," and no constitutional provisions, either state or federal, are cited or relied upon.*[1]

In connection with petitioners' failure to raise constitutional issues we call the Court's attention to pertinent portions of the Record.

In the State Court of Appeals, there was no error

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[1] Respondent has also filed a praecipe in the Supreme Court of Oregon and in the Court of Appeals of Oregon designating for inclusion in the record of this Court all of the printed briefs filed in those courts.

assigned, or issue raised, with respect to the integrity of the Trial Judge, of any nature whatsoever. That matter is now the subject of Petitioners' Question No. 1 (Pet. p. 2).

As to Question No. 2, the trial court's observation on their failure to call available witnesses (Pet. p. 3), that observation was the subject of Assignment of Error No. 8 in the Court below. The text of that Assignment with supporting argument is found on pages 207-211 of Petitioners' principal brief below. It was answered by Respondent on pages 90-93 of its brief and replied to by Petitioners in their Reply Br., pp. 53, 54. Aside from a passing reference to a "basic constitutional right" in the Reply Brief (P. 54), there is no suggestion of any federal question.

As to Question No. 3, relating to the scope of declaratory relief (Pet., p. 3), the same basic question was the subject matter of their Assignments in Error Nos. 10 and 11 below. These assignments with supporting argument are found at pp. 229-240 of Petitioners' brief below. Respondent answered the assignments at pp. 99-104 of its brief, and petitioners replied at pp. 63-74 of their reply brief. No "constitutional" or other federal right was relied upon.

Question No. 4 (Pet., p. 3) challenges the admission in evidence of two exhibits, identified as Ex. 113 and 488 (See Petition, pp. 30-33). The same basic objections as to authorship and supposed alterations as are raised here, were argued in the trial court and raised in Assignments

of Error 3 and 5 below. The pertinent Assignments and supporting arguments are at pp. 159-162 and 171-147. (Ex 113), and pp. 191-199 (Ex 488) of Petitioners' brief below. Again, Respondent answered (pp. 72-76; 86-88) and petitioners replied (pp. 49, 50; 52, 53). Aside from one reference to a "constitutional right of cross-examination" (App. Br. 197), a right no longer relied upon, there is again no suggestion of a federal constitutional issue.

The opinion of the Oregon Court of Appeals, *DeLong Corporation v. Oregon State Hwy Com.*, — Or App —, 495 P2d 1215, 94 Or Adv. Sh 983 (1972), contains no discussion or decision of any issue of due process, or of any other federal question.

This Court has held that only constitutional issues raised in the lower courts are before it for review. *Shelley v. Kraemer*, 334 U.S. 1, 8, 9 (1948).

Here, none of the four "Questions Presented" were suggested as sources of any due process issue either in the trial court or by Assignment of Error in the Oregon Court of Appeals.

In their Petition for Rehearing filed in the Oregon Court of Appeals, Petitioners first suggested that the trial court's observation on their failure to call available witnesses involved rights of ". . . due process of law under the constitutions of the State of Oregon and of the United States." (p. 5;). The argument in support of that contention cites no specific provision of either constitution or, indeed, any authority other than one Alaska state

court decision (pp. 25, 26). That argument, with vague constitutional overtones, was repeated in the original Petition for Review filed in the Oregon Supreme Court (pp. 48-50).

Otherwise, none of the four "due process" questions were raised as such until, as previously noted, petitioners belatedly raised the "judge" issue in their "Supplemental Petition for Reconsideration of Petition for Review."

It is fundamental that this court lacks jurisdiction on certiorari to review a federal question not raised, briefed or argued in the state courts. *Hill v. California,* 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

It is also the rule, at least in civil cases arising in State courts, that a federal question first raised on an application for rehearing in State appellate courts comes too late, and will not be reviewed here. *Hanson v. Denckla,* 357 U.S. 235, 243, 244, reh. den. 358 U.S. 858 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945).

If ever there was a case which warranted a denial of certiorari solely because the supposed federal questions were not timely raised and preserved, this is the case.

As outlined in the Statement of the Case (supra, pp 4–7), this case involves events occurring principally from 1962 to 1964. The action was commenced in 1965, involved extensive motions, amendments to pleadings and discovery, and finally came to trial in the spring of

1968. Reduced to essentials, the subject matter was conflicting claims of breach of contract.

The trial extended over a period of six months, and included over 9,000 pages of testimony and some 900 exhibits. Testimony was concluded in September, 1968, and the experienced Trial Judge considered the matter, presumably weighing the mass of evidence, until January 31, 1969, when he issued his well-reasoned opinion, including findings. The formal judgment was entered May 23, 1969, and an appeal followed. Lengthy briefs were filed in both sides, with numerous extensions of time, and oral arguments before the Court of Appeals were held on September 27, 1971. That Court affirmed the judgment in all respects on April 7, 1972.

Petitions and Supplemental Petitions for rehearing, review and reconsideration by the Oregon appellate Courts followed, and the last of these was denied December 12, 1972. *We repeated the foregoing to emphasize the magnitude of this case and the time and the "blood, sweat and tears" heretofore expended.*

After the protracted history of the case petitioners seemingly desire that this Court undertake to review the evidence (see Pet., pp. 29-33), or at least remand the cause of the Oregon Courts to start all over again. Such a result, we submit, should not occur without the clearest and most compelling of grounds.

As noted above, it was not until December 1, 1972, in their "Supplemental Petition" to the Supreme Court of Oregon, that petitioners raised the issue relating to

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alleged grounds for disqualification of the trial judge. Even the petitioners seem to concede that their other points are not of independent concern to this court.[6]

They suggest that they did not discover the supposed relationship until sometime in 1972, when an investigator was employed. See the Affidavit of Mr. Cheasty, (Pet., p. 12a). The exact date of his employment is conspicuously absent, but the dates given strongly suggest that this was not until after the Oregon Court of Appeals' decision on April 7, 1972.

Why petitioners should suddenly decide to employ someone to "investigate the genuineness of certain documents and to do other factual research" (Pet., p. 12a) years after the trial and probably after the judgment was affirmed, is not explained. The lack of explanations is especially significant, since counsel ". . . *had serious doubts, beginning when there Exhibits . . . were introduced, as to the validity of their identification and as to their origin and identity.*" (Pet., p. 31a).

Against this background, the belated assertion of supposed violations of due process rights smacks of ". . . baseless, harassing or vexatious litigation in court after court by a disappointed litigant," of which petitioners "doth protest too much" their innocence (Pet., p. 4).[6]

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[6] "The other errors of the trial court discussed herein emphasize the denial of due process of law suffered by Petitioners." (Pet., p. 34).

[6] The records of this Court will show thaat Petitioners also filed two Notices of Appeal to this Court, and unsuccessfully applied to Justice Douglas for a stay of execution, pending the proceedings on

If, as petitioners seem to imply, the decision of the trial Court could only result from bias on the part of the judge, why did they wait until four years after the trial to investigate and discover the supposed relationship? As shown by the documents reproduced in the petition, the transaction to which they object was concluded and a matter of public record no later than July 5, 1967 (Pet., p. 16a), nearly nine monthe *before* the trial started.

Respondent submits that there is not now and never was a significant federal question in this case, and that if there had been, the failure to raise and preserve it below is sufficient reason, under established principles, for this Court to refuse to review the matter.

III. The State Court Decision Rested on Substantial and Sufficient State Grounds.

It is also established doctrine that this Court will review a state Court's decision only when it appears that a federal question was presented to the highest state Court having jurisdiction, and that its decision on the federal question was necessary to its determination of the cause. Where the decision might have been on a substantial and sufficient state ground, this Court will not undertake to review it. *Durley v. Mayo*, 351 U.S. 277, reh. den. 352 U.S. 859 (1956); *Dixon v. Duffy*, 342 U.S. 33 (1951); *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945).

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appeal and/or certiorari. Similar application was made to and rejected by the state Circuit Court. As noted above, a separate suit to permanently enjoin Oregon's Attorney General from enforcing the judgment is pending in U. S. District Court for Oregon (See Pet., p. 5, n. 2). An appeal from the District Court's denial of a preliminary injunction is now pending in the 9th Circuit.

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Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain the judgment, this Court will not take jurisdiction. *Lynch v. New York,* 293 U.S. 52, 54 (1934).

When the highest court of a state has failed to pass upon a federal question, it will be assumed that the omission was due to a want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. *Street v. New York,* 394 U.S. 576, 582 (1969).

There principles would also bar review by this Court, even if the presentation of a federal question below should be deemed sufficient.

It seems self-evident that petitioners "Questions Presented" Nos. 2, 3 and 4[7] were indeed decided on substantial and sufficient state grounds. Moreover, all of the matters involved in Questions Nos. 2, 3 and 4 were thoroughly briefed, argued and determined primarily or exclusively on the basis of traditionally state-law arguments.

Because of its late appearance, it might be argued that Question No. 1, relating to the supposed "relationship"

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[7] These are the questions involving, respectively, the "weaker and less satisfactory evidence" rule, the scope of declaratory relief, and the admissibility of certain exhibits. Petition, p. 3.

between the trial Judge and Respondent, was necessarily decided by the Oregon Supreme Court on a federal due process basis. That Court issued no written opinion in refusing to review the Court of Appeals' decision.

However, Respondent submits that the "judge" question could have been and presumably was based on adequate state grounds.

Petitioners related complaint in the U. S. District Court referred to above includes all of the material set out in the appendix to the petition here. That material strongly implies irregularity by the state Trial Judge and/or the Board of Control.

During oral argument on petitioners' motion for a temporary injunction, when pressed by the Federal Trial Judge, Petitioners' counsel retreated to admit that they claimed no irregularity in the land transaction or at the trial. Moreover, in the ruling from the bench denying the temporary injunction, *the court found that petitioners had admitted during arguments on the motion, that the State Trial Judge had not been biased or prejudiced.* Portions of the proceedings and the courts ruling are set out in the appendix, (Infra, pp. 27-A–35-A).[6]

Petitioners argument, then, is that under the Oregon

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[6] Perhaps it is relevant here to direct the courts attention to *Lord Brothers v. State Highway Commission*, Marion County Case No. 62911, which involved a highway construction contract dispute. Judge George A. Jones presided over a 10 day trial beginning December 4, 1967. On January 17, 1968, Judgment was entered awarding the Plaintiff Contractor $38,207.88 in damages (with interest) against the State. This case was tried after the "land transaction" and before the DeLong case.

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statutes (ORS 14.250; 14.250; Pet. pp. 50a, 51a), they were entitled to a change of judge upon the mere assertion of a belief of prejudice, by means of the statutory affidavit. If, as the federal court, found, petitioners admitted that the trial judge was not actually biased or prejudiced, they must mean that upuan a *ex post facto* showing of facts which they now say would have caused timely affidavits of prejudice to be filed, they are entitled to a new trial *even though they concede that there was no actual bias or prejudice against them*: Such a contention defies logic and is not supportable under State law.

Even under Oregon's liberal statutes, a litigant is not entitled to a friendly judge, but only to one who is impartial. *Archerd v. Burk*, 148 Or. 444, 451, 36 P2d 338 (1934).

Although a motion for change of judge may be allowed without establishing any actual prejudice on the part of the judge, if the affidavit is challenged it is still necessary to make a showing that the belief of prejudice is asserted in good faith. *State ex rel Lovell v. Weiss*, 250 Or 252, 430 P2d 357, 422 P2d 241.

The petitioners would have this Court hold that they are entitled to relief when they seek to disqualify the Judge for no reason at all, long *after* he decides the case against them.

Former Oregon statutes which provided for disqualification of a judge without cause were held unconstitutional, as being in violation of the principle of separation

of powers declared in Art. III, § 1 of the Oregon Constitution. *State ex rel Bushman v. Vanderberg*, 203 Or 326, 341, 280 P2d 344 (1955).[9] Obviously, the Oregon Supreme Court may very well have analyzed the "judge" issue in a similar way, and rejected it on purely state grounds.

There are other adequate state grounds to support the decision on this point. For one thing, the Oregon statutes provide in part that an affidavit of prejudice shall be filed:

> ". . . in contested cases before or within five days after such cause . . . is at issue upon a question of fact or within 10 days after the assignment, to preside over such cause . . .". (ORS 14.260; see Pet., p. 51a)

Or, in counties where there is a presiding judge, the motion and affidavit shall be filed at the time of the assignment of the case to a judge or:

> ". . . not later than the closing of the next judicial day; but no motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause . . .". (ORS 14.270; see Petition, p. 52a)

The "timely filing" provisions of these and predecessor statutes are construed to mean what they say, and a party who attempts to disqualify a judge too late will be barred from doing so. *Merimac Co. v. Portland Timber*, 259 Or 573, 575; 488 P2d 465 (1971); *State v. Little*, 249

[9] Even in states allowing each party a preemptory challenge to a judge, it is recognized that such "right" is a matter of grace to be distinguished from a disqualification for cause. *Hickey v. Superior Court*, 505 P2d 1086 (Ariz. App. 1973).

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Or. 297, 303, 431 P2d 810 (1968), cert. den. 390 U.S. 955, (1968); *Rex Mtge. Loan Co. v. Stanfield*, 194 Or. 698, 244 P2d 173 (1952); *Mursener v. Redding*, 176 Or. 617, 628, 160 P2d 307 (1945); *Phy v. Allen*, 115 Or 168, 173, 236 P. 1056 (1925).

Certainly the Oregon Supreme Court was following Oregon law in rejecting Petitioners' attempt to disqualify the trial judge where the attempt was made after the case was tried, decided adversely to Petitioners, and affirmed on appeal.

Petitioners' attempt to avoid the requirement of timeliness of the basis of newly discovered facts will not bear scrutiny where they have offered no explanation whatever for the long delay in discovering the facts disclosed by public records.

Oregon law is that a party is chargeable with knowledge of matters of public record. See, e.g., *Kernin v. City of Coquille*, 143 Or 127, 136, 21 P2d 1078 (1933).[5] Thus, petitioners were chargeable with knowledge of the facts regarding the "relationship" at the time the case was assigned to Judge Jones for trial, and there can be no excuse for waiting until after an adverse decision, to try to disqualify the Judge on the basis of those facts.

Numerous other courts, both state and federal, have recognized the general principle that a party seeking to

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[5] The affidavit of Mr. Cheasty, Petitioners' investigator discloses that substantially all of the facts regarding the "relationship" were found in the Deed and Mortgage records of Polk County, Oregon, the minutes of the Board of Control of the State of Oregon, and assumed business name records. The latest recording date mentioned was July 5, 1967. (Pet., pp. 12a-17a).

disqualify a judge is obligated not only to act promptly upon discovery of the facts, but to exercise reasonable diligence in discovering the facts upon which they rely in charging bias as prejudice. See, for example, *Mayo v. Beber*, 177 Cal App. 2d 544, 2 Cal. Rptr. 405 (1960); *Aaberg v. District Court*, 136 Colo. 525, 319 P2d 491 (1958); *Silas v. Proctor Coal Co.*, 272 Ky. 477, 144 SW 2d 749 (1938); *Johns Hopkins University v. Hutton*, 316 F. Supp. 698 (D.C. Md. 1970); *United States v. Hoffa*, 245 F. Supp. 772 (D.C. Tenn. 1965).

In *United States v. Hoffa, supra*, defendants had been convicted of a crime, and the conviction affirmed on appeal. In moving for a new trial and for disqualification of the original trial judge, defendants relied on affidavits obtained some 18 months after the trial, and a few days after the affirmance on appeal. Although there were also other grounds for denying the motion, the following remark of the Court is apposite:

> "In this case there is a total lack of showing of any facts upon which diligence might be inferred. *The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any other time.*" 245 F. Supp. at 776. (Emphasis added)

The petitioners' argument about the supposed relationship were very probably rejected by the Oregon courts on the basis of State law. Their arguments on the other points raised here should, *a fortiori*, be regarded as rejected on state grounds below. No federal question having been necessarily passed on below, there is no

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federal question to be reviewed here, under the decisions of this Court discussed above.

IV. Aside from Jurisdictional Considerations, There Was No Disqualifying Relationship Between the Trial Judge and the Respondent.

We have heretofore discussed in detail the advertised public sale of the Colony Farm by the Board of Control at its appraised value. (Supra pp. 6–7) We reiterate that the sealed competitive bid by Judge Jones and his partners was the only bid received by the State. (Supra, p 7).

Petitioners claim that Judge Jones and his partners achieved a 50% increase in the average value of the purchased land (pet. p. 7). They then generously proclaim that they are not implying that the judge received a windfall (Pet. p. 7, n. 3).

An examination of the above claim illustrates the tenuous nature of petitioners reasoning and logic. Mr. Cheasty in his Affidavit calculates that Mr. Mason's July, 1965 appraisal reflects an average sales price of $421 per acre. He next reports, based on undisclosed reliable information, that Prudential Insurance Company had a June or July 1967 appraisal averaging $650 per acre on all of the land owned by Green Villa Farms.[9] The name of the appraiser is not disclosed. (Pet. 17a).

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[9] The Colony Farm contained approximately 754 acres of which 416.3 acres were non-tillable. (Pet. p. 16a) Mathematically the above referred to mortgage loan appraisal would include approximately 1850 acres at the claimed rate per acre. Nothing in petitioners affidavits disclose whether the other land owned by Green Villa Farms was similar to the Colony Farm.

Immediately one perceives that there is two years between the appraisals. Mathematically, the increase in land value under petitioners illusory formula would be 25%, not 50%. Moreover, *we submit that a subsequent appraisal by an undisclosed appraiser for a different purpose (mortgage loan) of a substantial different overall acreage is meaningless. There was no sale or other transaction to illustrate a value change.*

We have discussed the background and circumstances of the "land transaction" in detail as a preface to discussing petitioners legal authorities. Petitioners report "recent and controlling decision of this Court" to be: (Pet. p. 14) *Commonwealth Coatings Corp. v. Continental Gas. Co.*, 393 U.S. 145; *cf. Ward v. Monroeville*, decided November 14, 1972, 93 S. Ct. 80; *Tumey v. Ohio*, 273 U.S. 510.

The older cases are readily distinguishable. The *Tumey v. Ohio* case involves a situation where the mayor of the city served as the Trial Judge in a "mayor's court" and was compensated by the number of convictions obtained. The case held that a trial in such a court did not give a defendant convicted of boot-legging due process of law.

Ward v. Monroeville extended the *Tumey* doctrine to a situation where the Mayor served as a Trial Judge but was not paid on a per case basis. The defendant was tried and convicted for traffic violations. The opinion held that because the Mayor was responsible for the finances of the City,(which included substantial sums

in traffic and other fines, due process required a different impartial judge.

We submit that the continuing direct and existing conflict of interest of a Mayor serving as a Trial Judge under those circumstances is completely different from the circumstances of this case.

The *Commonwealth Coatings Corp.*, case, *supra,* is also distinguishable on the facts. In that case the plaintiff subcontractor sued the prime contractor's surety. The matter was submitted to arbitration under the Federal Arbitration Act. Each party selected an arbitrator and they selected a third. The third arbitrator was a consulting engineer that had *irregular but repeated business* with the defendant, and had received fees totalling $12,000 over four or five years. The business relationship had been dormant for about a year, but apparently, had not been terminated. This business relationship with the defendant was not disclosed to the plointiff. This Court set aside the arbitration.

The facts of the *Commonwealth* case are distinguishable from this case in many respects including the following:

1. *Identity of Parties.* There the arbiter' relationship was directly with the defendant. Here the land transaction was not with the Respondent, but was with the State Board of Control, a different entity.

2. *Basic Nature of the Relationship.* The arbitrator had a continual, if intermittent relationship with the defendant, which apparently was dormant, but open. In this case there was a single arms-length transaction that had been closed and completed.

3. *Type of Contact.* The arbitrator as a consulting engineer would, of necessity, become involved with the operational affairs and personnel of the defendant. In this case the basic necessary contact was the submission to the Board of Control of a sealed bid to purchase the Colony Farm.

4. The element of advertising and competitive bidding, an important part of public contracting and the sale of publically owned surplus property, was not involved in the *Commonwealth* facts.

The two other cases cited by petitioners, *Carr v. Fife*, 156 U.S. 494; and *Texaco Inc. v. Chandler*, 354 F.2d 655, cert. denied, 383 U.S. 936, as implied by petitioners, are not too applicable or helpful in this case.

Interestingly in the *Carr v. Fife* case, this Court held that the fact the Trial Judge had represented some of defendants in unrelated matters prior to his appointment to the bench did not disqualify him from trying the case, and that the trial judge must be permitted to decide for himself whether or not to trye the case.

In that case, the Motion to Disqualify was made prior to trial. The opinion does not reveal the length of service of the Trial Judge prior to the subject litigation.

We have heretofore discussed the substantial and unexplained lack of diligence on the part of petitioners in investigating and discovering the relationship between the Trial Judge and the State Board of Control (Supra, pp. 14-16). We reiterate that petitioners' lack of diligence is an important factor for direct consideration by this Court in determining whether to grant certiorari. It is also obviously important in deciding whether or not the judgment is supportable on State grounds.

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V. **Aside from Jurisdictional Considerations, There Was No Error in the Trial Court's Recognition That Petitioners Failed to Call Potential Witnesses.**

As has been noted, petitioners' Question No. 2 urges, in effect, that they were necessarily deprived of due process rights "guaranteed by the 14th Amendment" because the trial Court, in its written opinion, remarked upon their failure to call potential witnesses, including Colonel DeLong.

> ". . . in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party of produce, the evidence offered should be viewed with caution." (Pet. Question No. 2, p. 3; Trial Court's Opinion, pp. 3a, 5a).

Col. L. B. DeLong testified on deposition that he was the principal shareholder and president of DeLong Corporation, and was superintendent or project manager on this job from the time of George Bauer's death in May, 1963 (Ex. T-15, pp. 25, 56; See Resp. Br. p. 20) Petitioners in the State Trial Court did not present testimony by their second-level people, the formen and inspectors in charge of the DeLong crews and the work.

As noted above, the same comment was the subject of their Assignments of Error No. 8 in the Oregon Court of Appeals. In that Assignment, no "due process" or other federal question was asserted. (Supra, p. 11)

In responding thereto, Respondent pointed out among other things that Colonel DeLong's deposition was received in evidence and presumably considered, that the

Court's remark merely reflected a statutory jury instruction,[12] and that the Colonel could have testified on various pertinent matters not touched upon during his deposition (Resp. Brief, pp. 90-93).

Under Oregon law the same concept incorporated in the jury instructions is properly applicable when the Court, rather than a jury, is weighing the evidence. *Olds v. Van der Hellen,* 127 Or 276, 287, 263 P 907, 270 P. 497 (1928); *See also: Old Colony Insurance Company v. S. S. Southern Star,* 280 F. Supp. 189, 191 (D.C. Or., 1967), where the Court observed:

> "Such testimony would seem to be readily available to carrier and in the absence thereof or a reasonable explanation as to why it was not taken the Court can and does infer that it would have been unfavorable."

Respondent submits that any trier of fact, whether judge or jury, might with good reason find it remarkable that when a corporation is a litigant in a multi-million dollar action, its principal officer, with personal knowledge of the many materal facts, would not be called as a "live" witness.

There was no error in the trial Court's remark directed toward the weight of the evidence, under state law, and no federal question is presented.

VI. Aside From Judicial Considerations, There Was No Error in the Declaratory Relief Granted.

In support of their Question No. 3 (Pet., p. 3), petitioners seem to urge that they were improperly held

[12] ORS 17.250 (6) and (7), is reproduced in the Petition, (p. 53a-54a).

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liable to a non-party (Pet., pp. 2325). This is not the case at all.

Respondent's complaint insofar as pertinent to this point, alleged in substance that DeLong breached its contract by abandoning and failing to complete the work; that U. S. Steel Corporation, another contractor, has asserted a claim that as a result of the delay in completing the piers (under petitioner DeLong's contract), it has suffered delay damages in completing the superstructure, and that plaintiff (respondent here) was contractually liable for such delay damage. It was further alleged that under quoted provisions of DeLong's contract, DeLong was responsible for any loss suffered by other contractors on account of interference, untimely completion, or other cause. (Supp. Ab. 151-153).

The pertinent part of the prayer was for a declaration that *as between the parties,* plaintiff was not liable to U. S. Steel for any such delay damages rested upon defendants, who should indemnify plaintiff on account thereof (Supp. Ab. 154, 155).

There was no dispute as to U. S. Steel's assertion of such a claim, or as to the pertinent contract provisions relating to interference with the operations of other contractors. The trial Court found that DeLong breached its contract in failing to complete the piers, that the State's cancellaion of the contract was valid and proper, and that ". . . any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defend-

ant and the Court so declares." (Ab. 22-25; Pet., p. 4a, 7a).

The formal Declaratory Judgment on this aspect of the case declared that:

> "6. As between plaintiff and defendants, any and all delay to United States Steel Corporation, the contractor for the steel superstructure erected upon the substructures which were the subject of the contract between plaintiff and defendant DeLong Corporation, which occurred from and after April 13, 1964, was caused by the fault of defendant DeLong Corporation;" (Ab. 73)

Thus, there was no adjudication that U. S. Steel suffered any delay, or sustained any damage, or that if so anyone was liable therefor. The issue of responsibility for delay in completing the piers was part and parcel of this action, and the trial Court's declaration regarding U.S. Steel merely reflected its adjudication of the dispute between the immediate parties.

Assuming, *arguendo,* that U.S. Steel will assert collateral estoppel against Petitioners (See Pet., p. 25, n. 18); it is evident that U.S. Steel would in any event still have to prove that it was in fact delayed, that the cause of the delay to it was the delay in completion of the piers, and that it was damaged as a result.

If collateral estoppel is available to U.S. Steel at all, (an issue obviously not before this Court), the only factual defense of which DeLong might be deprived would be that it was the State's fault completion of the piers was delayed after April 13, 1964. If U.S. Steel sought to recover for delays prior thereto, even the

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"State's fault" defense would be available as to any such delays.

Since the question of responsibility for delays in the pier completion was in issue in this case, there was certainly no error in an express declaration that as between the immediate parties, DeLong was at fault with respect to delays after a designated date, and hence responsible for any loss which U.S. Steel might be able to prove was suffered as a result of those delays in the pier contract. No judgment for or against U.S. Steel was sought or granted.

Here, again, Petitioners raised the same point, without constitutional embellishments, as the subject of their Assignments of Error Nos. 10 and 11, in the state Court appeal (App. Br. 229-240) respondent fully answered (Resp. Br. 99-104), and the Oregon Court of Appeals found it unnecessary to specifically discuss this point. At the conclusion of an opinion running to 21 pages in the Pacific Reporter, in which the Court carefully considered the major points on the appeal, it was said:

> "We think the trial court made findings concerning every material fact necessary to its determination of the issues before it and to support its conclusions of law based thereon. The law requires no more. These findings are amply supported by the evidence.
>
> "Discussion of the remaining assignments of error, whether on the appeal or on the cross-appeal, would add only prolixity to this opinion. We conclude that they are without merit." 495 P 2d at 1236.

The same essential objection now raised here with respect to the declaration regarding U.S. Steel's claim

was one of the "prolixity-adding" contentions the Oregon Court found to be "without merit," and it deserves a similar fate at the hands of this Court.

VII. Aside From Jurisdictional Considerations, There Was No Error and Certainly No Fraud in the Admission of the Challenged Exhibits.

Question No. 4 attempts to raise a due process issue with respect to the introduction and supposed reliance upon "exhibits fraudulently offered and substantially altered." (Pet., p. 3)

In their Statement of the Case[8] petitioners refer to "extrinsic fraud" (Pet., p. 10), and undertake to re-argue the weight of the evidence, particularly with respect to Plaintiff's Exhibits 113 and 488 (Pet., pp. 11-13).

In their argument, petitioners suggest that the trial Court's conclusion on a key factual issue, the cause of defective concrete seals, could only have been based on these two exhibits (Pet., p. 30).

First respondence categorically denies that there was any fraud in connection with these or any other of its exhibits. The charge of fraud, like the "due process" issue, was not timely raised below and comes too late in a Petition for Certiorari to this Court.

Next, we repeat that the authorship and identity of numerous exhibits, including Exhibits 113 and 488, were challenged in the trial Court and on appeal. Pertinent

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[8] "A concise statement of the case containing the *facts* material to the consideration of the questions presented" Rule 23, par. 1(e), Supreme Court Rules, emphasis added.

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references to the briefs below appear above (supra, pp 11-12) and will not be repeated here.

Next, there was a wealth of evidence to support the trial court's findings as to the causes of the defective concrete, and Petitioners' claim that the decision is supported only by the two challenged exhibits rests on nothing but Counsel's conjecture and argument. In view of the extent of the evidence bearing on this question, the claim is patently absurd.

We deem it inappropriate to re-argue the facts of the case here, but include a summary of the evidence on this point in the Appendix (Infra, pp. 8-A–15-A reproduced from pages 25-30 of Respondent's Brief below).

To the extent that the trial Court's opinion indicates what specific evidence was deemed persuasive on the issue of causes of the defective concrete seals, it appears that the Court's primary reliance was on expert testimony (Ab. 23; Pet., p. 5a), rather than on any particular exhibit or exhibits.

Even if the challenged exhibits were erroneously admitted, under Oregon law it is presumed that in non-jury case, receipt of inadmissible evidence was not prejudicial. *State v. Carnathan*, 2 Or. App. 67, 465 P2d 899 (1970); *Lehahan v. Leach*, 245 Or 496, 500, 422 P 2d 683 (1967); *Bakkensen v. John Hancock M. Life Ins. Co.*, 220 Or 484, 494, 353 P2d 558 (1960). Petitioners here have failed to and cannot overcome that presumption.

Petitioners apparently would have the Court regard the reports of their Questioned Documents Examiner

(Pet., pp. 33a-49a) as newly-discovered evidence, or the like. Mr. Rand, of their attorneys, candidly admits in his affidavit that "We had serious doubts, beginning when these Exhibits 113 and 488 were introduced, as to the validity of their identification and as to their origin and identity." (Pet., p. 31a). Why, in that event, he waited until 1972, four years after the trial, to employ an investigator "to investigate the genuineness of certain documents" (Affidavit of Mr. Cheasty, Pet., p. 12a) is not explained. If for no other reason, the "questioned document" evidence should be disregarded for lack of diligence in obtaining it.

Finally, the reports of the document examiner, if critically analyzed, seem to reveal nothing more sinister than that several persons made entries in the diary (Ex. 113) and the batching records (Ex. 488) at various times. From their inherent nature, this is not surprising, and was explained at the trial.

The document examiner apparently was unable to find evidence that any "editorial" or supplemental entries in the diary were entered otherwise than at the date indicated. He carps, however, that making an entry dated on "1/10/64" on the diary page for "12/15/63" was ". . . a violation of instructions printed in the inside of the diary cover. . . ." (Pet., p. 38a). If so, that is a matter going only to the weight of the evidence, does not tend to show fraud, and certainly presents no due process issue to this Court.

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CONCLUSION

Respondent accepted the challenge of the Petition and discussed in detail the many issues set out therein. This is an important substantial case that has "spanned a decade" of controversy and litigation. It is our hope that the length of this brief will not obscure the simple issues and the patent lack of merit in Petitioners' cause.

Petitioners utterly failed to persuade the Oregon appellate Courts of any error in the trial of this hoary cause. They did not timely raise and preserve any federal question below, and have not shown any such question here. Most of the points raised here were urged below and rejected on adequate state grounds. No justification for the failure to discover the so-called "new evidence" on any point, until long after judgment and subsequent to affirmance on appeal, has been shown.

The petition should be summarily denied.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

WALTER L. BARRIE
Assistant Attorney General
and Counsel

LESLIE B. HAMPTON
Assistant Chief Trial Counsel
Counsel for Respondent

April 1973

Exhibit A

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, VAL D. SLOPER, being first duly sworn on oath, depose and say:

That I am the Presiding Judge of the Circuit Court of Oregon for the County of Marion, Third Judicial District. I was elected to the Circuit Court Bench in November, 1954 and assumed the position in January, 1955. I was elected Presiding Judge in January, 1965 and have served as Presiding Judge since that date.

On the 30th day of August, 1965, the State of Oregon filed a suit for a Declaratory Judgment against the DeLong Corporation and the Travelers' Indemnity Company, Marion County Case No. 59-323. There were numerous motions, demurrers, and other preliminary legal matters prior to the trial that commenced on March 18, 1968. I presided over all preliminary legal matters in Marion County prior to trial.

During the first or second week of March, 1968, there was a pre-trial conference in my office attended by the attorneys for the respective parties. At that time, the attorneys estimated that the trial would last four to six weeks or longer, depending on whether or not a jury was empaneled. Because of my duties as Presiding Judge, I felt I should not personally be involved in a trial of that duration. Consequently, I assigned the case for trial to the Honorable George A. Jones. Judge Jones had no

prior duties in connection with or related to this lawsuit prior to the trial assignment which, according to the best of my recollection, was approximately one week prior to March 18, 1968.

No motions or affidavits were filed by the parties relative to the qualifications of any of the Judges in this district to preside over this case. Moreover, I was not advised formally or informally that any judge in the district, was unacceptable to any of the parties.

DATED this 27th day of March, 1973.

VAL D. SLOPER
Circuit Judge

SUBSCRIBED AND SWORN to before me this 27th day of March, 1973.

B. W. PEYTON
SEAL Notary Public for Oregon
My Commission Expires: Jan. 16, 1973

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Exhibit B

STATE OF OREGON)
) ss. EXHIBIT "B"
County of Marion)

I, Carl A. Haugerud, being first duly sworn on oath depose and say:

That I am the Deputy Administrator of the Vocational Rehabilitation Division of the Department of Human Resources, State of Oregon. In 1960, I was employed by the State Board of Control and served in various capacities until my appointment as secretary on July 1, 1965. The secretary is the chief executive officer serving under the Board.

The Board of Control was made up of the Governor, the Secretary of State and the State Treasurer of the State of Oregon. Among its functions, was the administration of the State Penal Institutions, the State Mental Institutions, the Deaf and the Blind Schools, and the State T.B. Hospital.

In connection with those duties, the Board of Control, in the name of the State, held title to, and administered substantial real property holdings. To assist in the management of real property, the Board of Control Utilized an advisory board, called the "Land Use Committee" which was made up of appointed state officials and private citizens knowledgeable of real property and the management thereof.

One of the properties utilized in connection with the Oregon State Hospital was the "Colony Farm" which is located in Polk County, a few miles distance from Salem, the location of the State Capitol, and the State Hospital.

The farm was used for food production for the feeding of patients in the Oregon State Hospital in Salem.

Due to advances in the treatment of mentally ill patients and due to the construction of the Dammasch State Hospital, which is located about 25 miles north of Salem, the population of the Oregon State Hospital has been declining rapidly. In 1960, there were approximately 3,300 patients in that hospital. As of this date, there are approximately 600 patients there.

The Colony Farm became surplus to the needs of the State. Based on the recommendations of the staff and of the "Land Use Committee", the Board of Control decided to sell the Colony Farm. An appraisal was ordered from the Department of Veterans' Affairs, that maintains a staff of appraisers experienced in the appraisal of farm and residential properties. The appraisal in the amount of $175,000 was received on July 29, 1965.

In a meeting on August 17, 1965, the Board authorized sale of the property and established a minimum price of $175,000. The property was advertised for a cash sale in that amount.

On October 12, 1965, having received no bids, the Board directed the staff to study alternative methods of selling the Colony Farm. On November 3, 1965, the Board adopted a plan providing for a $175,000 minimum price with 25 percent down, the balance payable at 5½ percent interest over a 20-year period. The property was again advertised for sale.

On December 21, 1965, the Board, having received no bids, authorized the re-advertisement of the farm at $175,000 with $25,000 down, the balance being payable over a 20-year period at 5½ percent interest. On Feb-

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ruary 1, 1966, the Board of Control accepted the bid of "Green Villa Farms" at $175,000 under the advertised terms, who was the only bidder for the farm.

In advertising the Colony Farm for sale, the Board of Control placed ads with the Los Angeles Times, the San Francisco Examiner, the Portland Oregonian, the Statesman and the Capitol Press in Salem, the Itemizer-Observer in Dallas, Oregon (the County seat of Polk County) and with the Northwest Farm paper, an organization that publishes separate farm papers in Oregon, Washington, Idaho, Utah and Montana.

Green Villa Farms paid off their contract in full in July, 1967.

The Board of Control was abolished as of June 30, 1969 by act of the Oregon legislatures. The minutes, files and records of the Board are now in the Oregon State Archives. I reviewed and examined those records prior to making this affidavit.

In summary, the decision to sell the Colony Farm was made by the Board of Control with the advice of its staff and its "Land Use Committee". Through extensive advertising and sealed bids; the State, sold the property at its appraised value in the ordinary course of business using customary practices.

Dated this 27th day of March, 1973.

CARL A. HAUGERUD

Subscribed and sworn to before me this 27th day of March, 1973.

SEAL

JUANITA D. OLSON
Notary Public for Oregon
My Commission Expires: 2-29-76

Exhibit C

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, DON J. MASON, being first duly sworn on oath, depose and say:

That I am an independent fee appraiser and my office is located at 2586 Twelfth Place, S.E., Salem, Oregon. I am a member of the American Institute of Real Estate Appraisers and am an accredited rural appraiser. I am also a member of the Society of Real Estate Appraisers. I have been a real estate appraiser since 1959 and have had extensive experience in the appraisals of farms and ranches as well as the appraisal of other residential, commercial and industrial properties. Prior to 1959, I had 13 years experience in farm management, finance and other real estate oriented activities.

In January, 1959, I was employed by the State of Oregon, Department of Veterans' Affairs, as Farm Appraiser Supervisor. I appraised a substantial number of farms and ranches in that capacity. In addition to my own appraisal work, I supervised the other farm appraisers on the staff.

In the summer of 1965, I was given an assignment to appraise a property in Polk County, Oregon owned by the State Board of Control and known as the Colony farm. I was generally familiar with the area, where the property was located and made an extensive and detailed investigation of the area and of numerous comparable properties that had sold in the open market. I wrote an appraisal report dated July 28, 1965 setting out my opinion that the fair cash market value of the Colony

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farm was in the sum of $175,000. I had an alternative value of $177,500 if the farm was sold in two parcels.

I had no interest in the property whatsoever nor did I have knowledge of who, if anyone, was interested in purchasing the subject property.

I have been informed that the Colony farm was purchased by Green Villa Farms, a partnership composed of Asa Lewelling, George A. Jones and David Kennedy, Jr. At the time of the appraisal, I was not personally acquainted with any of those purchasers. I had heard of Mr. Asa Lewelling and knew he was a practicing attorney in Salem. I was introduced to Mr. Lewelling on one occasion some time in the early 1960's. I also recognized generally that the Kennedy family were farm operators in the Mid-Willamette Valley area at that time.

In March, 1968, I resigned from the Department of Veterans' Affairs and established my own appraisal practice. The first appraisal that I made for the Oregon Highway Division in any capacity was during 1969.

To summarize, my appraisal of the Colony farm was made routinely and objectively in the ordinary course of a routine assignment. My value conclusions were independently developed; and in my opinion, they represented the market value of the real property at the time the appraisal was made.

DATED this 26th day of March , 1973.

DON J. MASON, MAI

SUBSCRIBED AND SWORN to before me this 26th day of March , 1973.

SEAL

JUDY A. LeFORCE
Notary Public for Oregon
My Commission expires: 1-28-77

Defendants' Theory Unsound—Evidence

Although it is not deemed necessary to find or point out specific evidence justifying the trial Court's rejection of defendants' theory of what caused the bad concrete, it is nonetheless persuasive that several of plaintiff's experts had considered defendants' theory, found it unsound, and testified to the effect that it just could not have happened that way.

Defendant's theory at the trial was that vast quantities of riverbed material somehow worked its way under, over or through the steel cofferdams and into the seal area. (Tr. 5460-5462; 6447; 6783) In their brief, defendants characterized this theory in terms of "hydraulic" action (App. Br. 141, 142; 323).

Glen Paxson, a highly qualified former Deputy State Highway Engineer with over 40 years experience in bridge construction (Tr. 4695-4708; 4768-4770), testified that, in his opinion, based upon assumed facts, his own review of various documentary evidence, personal observation at the site and his general knowledge and experience (Tr. 86[illegible]), the underrun in the seal concrete was not caused by the intrusion of materials from outside the cofferdam (Tr. 8631).[18] Basically, this was because the only way for sand or other streambed material to get into the seal area was down the outside of the cofferdam piles, under the tips, and up the inside of the cofferdams. Neither the minimal differences in hydraulic "head," or

[18] This testimony was on rebuttal, and not subject to defendants' motion to strike, denial of which is now assigned as error (App. Br. 155).

any differences in the weight of materials inside and outside the cofferdam, were sufficient to have forced sand underneath the sheet piles. "* * *The probability of such a thing happening is so remote that it can be considered as impossible." (Tr. 8631-8633)

Dr. Peter Klingeman, a professor of River Hydraulics of the Oregon State University School of Engineering (Tr. 8667, 8668) opined that substantial quantities of material did not intrude beneath the cofferdam sheeting (Tr. 8683). The only three way for this to occur would be by heaving, a blowout, or piping (Tr. 8684. Heaving could only occur if a large differential head existed and if there was a very minimum of tip embedment of the sheeting, neither condition existed. (Tr. 8684, 8685) A blowout would require that there be very little or no tip embedment as a result of scour (Tr. 8685); here, the earlier scouring had been arrested so that a scour mechanism could no longer occur, to undermine the tips of the sheeting, and consequently a blowout could no longer occur (Tr. 8686-8688). Piping would also have required a substantial difference in water elevation or "head", which did not exist (Tr. 8688, 8689). The theoretical impossibility of any of these phenomena was confirmed by the sounding maps, which failed to show that any large quantities of material disappeared from immediately outside the cells in December, when the seals were poured (Tr. 8689, 8690).

It may also be noted that the defendants' witness Kennedy, who devoted considerable effort to explaining

and demonstrating the "blowout" and "heaving" phenomena (Tr. 6428-6442; Ex. F-13), freely admitted that this related to conditions existing in September, when the scour occurred, and not in December when the seals were poured (Tr. 6438; 6475-6477; 6497).

Slow Rate of Pour as a Cause—Evidence

There was evidence that at a meeting on January 22, 1964 (Tr. 417), after it was discovered that the seals were defective, Colonel DeLong himself acknowledged that the rate of pour at Pier 169 had been about 25 or 29 yards per hour, and that on future tremie pours it should be about 80 yards per hour (Tr. 431, 431).

At the time the contract was awarded, the DeLong management planned a concrete operation capable of producing 70 to 100 yards per hour (Tr. 4206-4208; 4712, 4713). Hans Wendel, DeLong's Chief Engineer (Tr. 6633), assumed a maximum rate of pour of tremie concrete in the seals of 100 yards per hour, in his calculations in designing a cofferdam at Pier 169 (Tr. 6824-6833; Ex. 437, sheet 10). The DeLong people were disappointed in the performance of their concrete batching plant (Tr. 6844).

The actual rate of pour, as computed by one of the State engineers, averaged 25.1 yards per hour at the east or upstream seal, and 27.5 yards per hour at the west or downstream seal. (Ex. Q-1; Supporting data for these figures may be found in Exs. 112, 113 and 488).

In another case, Mr. Wendel testified on deposition that they expected production of 40 bags or 60 yards per

hour (Tr. 6845-6847). In that case, DeLong asserted against the supplier of the "Roto-bags" used in batching concrete, a counter-claim for $180,000, based in part on the supplier's alleged promise that the bags could be filled at a rate of not less than 40 bags per hour (Ex. 414). That "Answer and Cross-Complaint" was filed January 3, 1964, shortly after the seals were poured and the underrun discovered.

On the monthly estimate for work through December 10, 1963, the State had paid DeLong approximately $90,000 for the seal concrete placed in the first or downstream seal at Pier 169 (Ex. 6, Est. No. 13; Tr. 2425, 2426). On the following estimate, for work through January 10, 1964, the State withheld payment for the upstream seal of some $90,000, and deducted the $90,000 paid the previous month for the downstream seal (Ex. 6, Est. No. 14; Tr. 2429-2431), as a result of which DeLong claimed it had been underpaid $180,000 (Ex. S-8).

The Court, it is submitted, could well have regarded DeLong's assertion of a $180,000 claim against its supplier of equipment for deficiencies in the rate of concrete production, just at the time DeLong was losing $180,000 for pouring bad concrete as persuasive evidence that DeLong recognized a relationship between the rate of pour and the failure of the seal concrete. At the very least, it establishes that DeLong knew that the rate of pour at the Pier 169 seals had been too slow.

Be that as it may, however, there was ample direct evidence that the slow rate of pour was one of the sig-

nificant factors in producing the defective material in the seals.

Glen Paxon, whose qualifications have already been mentioned (supra, p. 25), designated the slow rate of pour as one of the primary reasons for the poor concrete (Tr. 4763).

Walter Cathey, a retired construction man of vast experience in pouring underwater concrete (Tr. 8466-8473), testified that on a tremie pour of the size here involved, good construction practice required a minimum rate of pour of 100 yards per hour (Tr. 8478, 8479), and that the slow rate of pour here contributed to the concrete's failure to meet specifications (Tr. 8518, 8519).

Ben C. Gerwick, Chairman of the Board of a contracting firm, had over 60 years experience in bridge building, both as an engineer and as a contractor (Tr. 8393-8399). His firm had built wharves and bridges "practically all over the globe" (Tr. 8399, 8400). He had extensive experience with the placing of underwater concrete (Tr. 8402-8406) and had been publicly identified as the man who had been down personally in more cofferdams and caissons than any other man in the world (Tr. 8407, 8408). His opinion was that on a pour of the size here involved the rate of pour should be about 120 yards per hour (Tr. 8408-8410).

Arthur Elliott, the California bridge engineer whose qualifications were previously discussed (supra, p. 15), opined that the slow rate of pour was a contributing cause of the failure, and that a pour of this size should

not be attempted without a capacity of at least 80 and preferably 100 yards per hour (Tr. 8799-8806).

Use of One Tremie Pipe and Water in Pipe as Causes of Defective Concrete—Evidence

At both seals in Pier 169, the concrete was poured through a single tremie pipe (Tr. 4741); Ex. 112, p. 23) which, after pouring at one location, would be moved to another location in the cofferdam (Tr. 4743; Ex. 489). Acceptable seals of comparable size were produced at Pier 170, where at least two and probably four tremie pipes were used (Tr. 8887, 8888; Ex. 491-493; *Cf.* Tr. 8899, 8901).

At times, as when the seal or prime was lost, water got into the pipe instead of concrete, and water would, on such occasions, gush between the flanges of the tremie tube (Tr. 2104, 2105; Ex. 113, p. 19).

Even Colonel DeLong agreed that concrete falling through water would "wash" and separate (Ex. T-15, p. 209). One of defendants' expert witnesses, William Mueser, agreed that if concrete fell from a tremie pipe through open water it would tend to separate (Tr. 5488, 5489).

According to Mr. Paxson, the basic cause of the bad concrete was the washing of the cement from the sand and gravel (Tr. 4763). Although the basic cause of the washing resulted from the slow rate of pour, leakage in the tremie pipe could also cause some washing (Tr. 4764).

Mr. Cathey believed that at least four tremie pipes

should be used on a pour of this magnitude (Tr. 8479, 8480). The joints on a jointed tremie pipe should be kept in a water tight condition (Tr. 8481). This witness was of the opinion that here the leaks in the tremie tube were the basic cause of the bad concrete, although other factors such as the slow rate of pour also contributed (Tr. 8518, 8519).

Ben Gerwick was of the belief that a least twelve and perhaps sixteen tremie pipes should have been used (Tr. 8411).

Arthur Elliott was of the opinion that it would be virtually impossible to make a satisfactory tremie pour with only one tremie pipe handled as was shown on Ex. 489 (Tr. 8803).

It is submitted that the evidence was more than sufficient to support the trial Court's findings as to what in fact caused the concrete to be bad. Certainly the evidence supported the Court's finding to the effect that it rejected, i.e., that defendants had failed to establish their supposed excuse for their breach of contract in refusing to remove and replace the unacceptable seals.

Defendants' Responsibilities, Termination of Contract—Evidence

The Court's remarks regarding it being the defendants' responsibility to pour good seals, to replace the defective material, etc., are of course derived from the basic nature of the contract and its specific terms and provisions. For example, the contractor agreed that the seals should be formed of Class A Concrete, with 10%

additional cement (Tr. 379; Ex. 3, p. 56), and it was provided that Class A concrete would, within 28 days, develop a compressive strength of 3300 pounds per square inch. (Tr. 380; Ex. 3, p. 58; Ex. 4, p. 31, art. 2.4.5) Failure of the seal material to meet these standards has been discussed (supra, p. 3). It was contemplated that only the best general practice was to prevail, and that only material and workmanship of the first quality were to be used (Ex. 4, pp. 2, 3, art. 1.4.2). It was agreed that the performance of work under inspection would not relieve the contractor from his responsibility to comply with the specifications, nor from his responsibility if the work was not so performed (Ex. 4, p. 4, art. 1.5.2).

All concrete was requred to be placed so as to avoid segregation of the materials, and where placed through pipes, the pipes were to be kept full of concrete, insofar as practicable, and their lower ends were to be kept buried in the newly placed concrete (Ex. 4, pp. 33, 34, art. 2.4.9). Concrete seals under water were required to be placed continuously from start to finish, and the surface was to be kept as nearly horizontal as practicable; tremie tubes were required to be kept sealed and to be kept full to the bottom of the hopper (Ex. 4, p. 36, art 2.4.12).

The defendants' refusal to proceed with the necessary remedial work, and other work on the project was discussed above (supra, pp. 4, 5), and this was assuredly adequate ground for cancellation of the contract, as declared by the Court (See Ex. 4, p. 21, art. 1.8.7).

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I certify that the following material is from the transcript of proceedings in the related case, *Delong Corporation, et al. v. Lee Johnson,* Civil Case Number 73-20, U. S. District Court for Oregon. The hearing on Plaintiff's motion on January 30, 1973 for a preliminary injunction. George W. Mead, Esq. (now deceased) was of Counsel for Plaintiff DeLong Corporation. Presiding was the Honorable James M. Burns, District Judge. Dale A. Ray, 442 U. S. District Court, Portland, Oregon, was the reporter.

Leslie B. Hampton
Counsel for Respondent

* * * *

MR. MEAD: Yes, Your Honor. I think I will stick mostly to the factual situation in the case and confine myself to that and to the factual situation to a limited degree, because I don't think that in this proceeding that the Court can determine questions of fact other than what appears on the record as a matter of a prima facie case, that is stated by the affidavit.

I think the background of the time of the filing of these various different cases, the proceedings with respect to Judge Jones, the timing of this all has some relevance.

Now, in the first instance, let me state, Your Honor, that in our affidavit, and in our complaint, we don't say that Judge Jones did anything fraudulent, that Judge Jones did anything that was improper, except that we believe that he should disclose to us his relationship with the State of Oregon at the time this case was assigned to him, and this is what we say with regard to Judge Jones, and we say that we were entitled to that and we were entitled then, at that

time, to make a decision on whether we want them to proceed with Judge Jones and waive a jury and go on with him at that time or have some other judge.

* * * *

Now, we say that at that time, in view of what had transpired, well, we feel that Judge Jones had the responsibility or should have, at that time, advised us of his relationship with the State of Oregon in connection with the acquisition of this property. We don't say that he did anything improper in acquiring the property; we don't say that he did anything improper in the trial of the case, and we don't accuse him of any fraudulent or misconduct of any kind (emphasis added) but we believe that he should have disclosed that to us; that is all we are saying about Judge Jones.

* * * *

In 1966, Judge Jones and his associates purchased the property. The affidavits show that the value that was affixed at that time was some $421 an acre for the property. We don't say that that is a low valuation, that there was anything the matter with the transaction, but we do say that—then he mortgaged the property, ultimately, at a contract, was paying the State, and then in 1967 he arranged for a mortgage on that property, an adjacent property, on the basis of a much higher valuation, fifty percent higher.

Now, we don't say there is anything wrong with that either. Then he paid off the mortgage and acquired the property from the State in 1967; I believe it was in June or July or thereabouts.

Now, we don't say that there is anything improper with that transaction. We recognize that in addition to the large prison farm property that was required, there was some adjacent properties that were also involved in that transaction. We are not concerned

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with the price; we are not concerned whether it was a profitable transaction to Judge Jones or an Unprofitable transaction. All we say is that we should have known about it at that time, known about his dealings of that type with the State of Oregon. We don't say that the State officials did anything improper with regard to it. It's merely a matter of disclosure, Your Honor, at that time, and we do say that in view of what had transpired there on our—

THE COURT: Well, excuse me. Wait a minute now, Mr. Mead.

MR. MEAD: Yes.

THE COURT: The allegation in the complaint which is filed is that Judge Jones purchased the property from the State at a very favorable price.

MR. MEAD: Yes, it was a favorable price.

THE COURT: Well, the allegations in Mr. Chesty's affidavit suggests that it was the same price as set forth in the appraisal that Mr. Mason made.

MR. MEAD: Yes.

THE COURT: Now, would one not properly assume that Mr. Mason was appraising the property for the State as the then owner and potential seller?

MR. MEAD: Mr. Mason, as I understand it, was a fee appraiser in that area, Your Honor, and did make an appraisel for the State. Also, he had made appraisals for the Highway Department, as I understand it, and we are not saying that there was anything improper about Mr.—that it was a favorable price, and I think it was a favorable price, because within just two years later, there was a loan made on the property, as I understand it, for $650 an acre.

THE COURT: Well now, wait a minute. Wait a minute, Mr. Mead. Let's stay with the allegation that it was acquired at a favorable price. Now, when you say "favorable price," do you mean if a person reads

that and reads through this allegation, you say the business relationship of Judge Jones involved the acquisition, during the pendency of this litigation, of certain valuable farm property, by the trial judge, together with two partners, from the plaintiff in the suit, from the State of Oregon, at a very favorable price.

MR. MEAD: Yes, sir.

THE COURT: Now, that sounds as if he got some real good deal from the State of Oregon; the fact of the business is, that as far as the operative allegations in the affidavit is, that he and his partners bought from the Board of Control at appraised value. Now, does that made it a favorable price?

MR. MEAD: I believe when we look at what happened two years later, it was a favorable price, and it was why I prefaced my remarks, if the Court please, and I jump right on that, that we don't say there was anything improper about it; the price was too high, it was too low, we don't say that at all. (emphasis added)

THE COURT: Well, it certainly sounds as if there is something funny going on when you say that Judge Jones bought a piece of property from the State of Oregon at a very favorable price. Now, secondly, we know that that property was purchased for a hundrey seventy-five thousand dollars, or $421 an acre.

MR. MEAD: That's right.

THE COURT: Right. Then you say two years later, when Prudential came in and paid off the State contract on that, as well as other parcels, that you end up with an overall average of $643 an acre, or whatever the $600 price is.

MR. MEAD: Approximately, that's right, and I

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mentioned that right off as Your Honor recalled, to the Court.

THE COURT: All right.

MR. MEAD: And I recognize—

THE COURT: Does that mean, therefore, that as of the time of the Prudential mortgage, that Prudential valued this parcel at $643 an acre?

MR. MEAD: Well, I think it means, Your Honor, that they must have valued it certainly at a great deal more than $421 an acre.

THE COURT: How do we know? Because we don't know the value of the other parcels.

MR. MEAD: That is absolutely true, Your Honor, and it was impossible for us to develop that, and I also made the observation, as the Court will recall, that this was a parcel combined with a larger parcel of property. We do know, I think, that most of this land was tillable land. I don't know what the other land could have been worth, $250 an acre, or it could have been worth a thousand dollars an acre, and I recognize that, and this is what I am mentioning, but I do say that if you acquire property at $421 an acre and two years later the price is $650 an acre, on an average, that that is a favorable transaction. I don't say that it is a favorable price. I mean by that that if I would buy the corner across the street over here, Your Honor, for a hundred thousand dollars, whether it would be appraised or not, and two years later sell it for a hundred fifty thousand dollars, that that hundred thousand dollar purchase would be a favorable price; that is all I am saying.

THE COURT: But there isn't any evidence here that that land was worth $643 an acre two years later.

MR. MEAD: Well, this was the average price, I believe, by the deed records that we were able to

determine, Your Honor, from the public record as to what the price was obtained.

THE COURT: That's like saying that if I sell Mr. Shenker a 1967 Ford for $500 and he gets a loan on it and then two years later he gets another loan on that Ford and four Cadillacs, that all of a sudden that Ford is worth a thousand dollars on the average, sounds like he's got a good deal on that Ford.

* * * *

I hereby certify that the following material is also from the transcript of proceedings in the District Court case, *DeLong v. Lee Johnson,* Case Number 73-20. The following is a portion of the oral opinion of the Honorable James M. Burns, District Judge, on February 21, 1973, denying Plaintiff's motion for a preliminary injunction. Roberta A. Armstrong, Court Reporter, Room 442, U. S. District Court, Portland, Oregon, reported the proceeding.

Leslie B. Hampton
Counsel for Petitioners

. . . This leaves the first two contentions which I'll discuss at some greater length.

First is the contention with respect to the judicial disqualification issue and second, is the contention based upon the receipt into evidence of the two allegedly forged or unconstitutionally got together Exhibits 113 and 488, I think I have the correct numbers there. Is there a substantial factual and legal likelihood that plaintiff will prevail on the judicial disqualification issue? I believe not for the following reasons:

In the first place, we're dealing with a somewhat peculiar situation in that under the Oregon statute any party has a right to disqualify two judges based upon a mere conclusory allegation that the judge is prejudiced against the party, and the essence of what

plaintiffs say here in their pleadings is that the deprivation occurred because they were unaware of the land transaction which had occurred between the State of Oregon and Judge Jones prior to the trial of the case in Marion County Circuit Court, that had they been aware of that matter, they would have exercised their right under the disqualification statute to have filed an affidavit of prejudice and therefore they would not have been required to go to trial before Judge Jones.

Thus, plaintiffs say they have been deprived of due process by virtue of being deprived by an impartial tribunal to hear their case, and I must say I've had considerable difficulty in analyzing this claim because of the existence of the arbitration case which has been cited—I do not recall the name of it now, but we've all read it and discussed it at some length.

Nonetheless, the two leading cases are the *Tumey* case and the *Ward* case, and I do not regard those cases as calling for a conclusion that in the precise situation that we have here, the failure of Judge Jones to have disclosed the land transaction and thus the preventing as a result of the filing of an affidavit of prejudice, is the constitutional equivalent of the lack of partiality amongst the tribunal that was found by the Supreme Court in the *Ward* and the *Tumey* cases.

A party does not have, in my judgment, a constitutional right to an automatic change of judge statute. A party has a constitutional right to a judge who is fair and distinterested, but the parties here and particularly at the last time that we argued this matter on January 30, the parties specifically disclaimed any claim that Judge Jones was in fact actually prejudiced. That is not said once, but said a number of times by Mr. Mead, so what we have here is a claim that Judge Jones' failure to disclose the land trans-

action prevented the plaintiffs from exercising their rights to an automatic change of judge under an Oregon statute. (Emphasis added)

I do not regard that Oregon statute or its violation as being of constitutional magnitude and I find a significant and substantial difference between the thrust of the cases mentioned and this case, so without even getting into the question which may also be involved in this particular contention, the question of due diligence, without even getting into that and assuming that the plaintiffs here were duly diligent vis-a-vis the Judge Jones' land transaction disclosure matter, I do not believe that the deprivation which the plaintiffs claim they suffered, would amount to an unconstitutional deprivation and so therefore, I cannot say that there is a substantial likelihood that the plaintiffs would prevail on that contention.

With respect to the exhibits which were alleged to have been prepared and/or altered or otherwise handled so as to produce a judgment based upon forged or otherwise unconstitutionally prepared documents, I am satisfied of the following:

Namely, that I am not satisfied that there is a substantial or factual likelihood that the plaintiffs will be able to prevail on this score because I'm not satisfied that the plaintiffs will be able to show that factually that they exercised due diligence with respect to the investigation of this matter, and insofar as this is a Reid type case, it is my belief that one of the essential elements of a Reid cause of suit is the exercise of due diligence whether an appeal is pending or not, and I cannot say from what is here before me that I believe there is a substantial factual likelihood that plaintiffs will prevail on that issue when this case comes to trial.

I have some question in my mind, but I don't think it's necessary to reach a decision on it. I have some

question in my mind as to whether or not there is a substantial legal likelihood that the plaintiffs could prevail on this score, but I find it unnecessary to answer that because I have already made a finding that there is no showing of a substantial factual likelihood that the plaintiffs will prevail.

The reason that I say I have question in my mind about that is that in the context of that case and the length of it, and the manner in which the exhibits came in and he whole matrix of that case, I'm not so sure legally that even if it were shown that the documents were forged, that it would entitle the plaintiffs to relief here.

* * * *

I hereby certify that the affidavits reproduced in the Appendix (pp. 1-A–7-A) are true copies of the original and the whole thereof as filed in *DeLong v. Lee Johnson*, Civil Number 73-20.

I further certify that the above excerpts from the Federal District Court proceedings on January 30, 1973 (App. pp. 27-A–32-A) and on February 21, 1973, (App. pp. 32-A–35-A) are true copies of the original as reported and certified to the above named Court reporters.

Leslie B. Hampton
Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, *by and through its* STATE HIGHWAY COMMISSION, *Respondent.*

PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The Brief for Respondent State of Oregon argues procedurally that no substantial federal question is presented by the Questions Presented in the Petition (Points I, II and III, pp 8-23) and then substantively, "aside from jurisdictional considerations", that the Trial Judge was not disqualified (Point IV, pp. 23-26); that the Trial Court correctly evaluated petitioners' evidence (Point V, pp. 27-28); that declaratory relief

involving a party in another action against Petitioners but not a party in the action, was correctly determined (Part VI, pp. 28-32); and that there was no fraud in admission of Respondent's exhibits (Part VII, pp. 32-34). Brief reply to each of these contentions is submitted seriatim but in the interest of brevity the procedural and substantive considerations are discussed together under each point.

I. The Trial Judge Was Constitutionally Disqualified.

Respondent (Br. p. 10) argues that disqualification of the Trial Judge was not raised in the intermediate Court of Appeals below. But Petitioners first learned of the Trial Judge's 1967 substantial business transaction with Respondent while the Petition to Review the Judgment and Opinion of the Court of Appeals was pending in the Supreme Court of the State of Oregon in 1972. On November 15, 1972 Petitioners filed their timely petition for Reconsideration of the Supreme Court's denial (on Nov. 8, 1972) of the Petition for Review and prayed that the Court withhold action until December 4, 1972 because of new matters of extreme importance which had come to the attention of counsel. On November 30, 1972 Petitioners filed the Supplemental Petition for Reconsideration of Petition for Review which set forth the newly learned facts of the Trial Judge's business dealings with Respondent and urged that "on constitutional grounds and in the interest of justice, the judgment herein of the single Trial Judge must be vacated in view of his undisclosed business relationship enjoyed during the pendency of the case * * *." Petitioners cited *Ward* v. *Village of Monroeville,* 409 U.S. 57; *Commonwealth Coatings Corp.* v. *Continental Cas. Co.,* 393 U.S. 145; *Tumey*

v. *Ohio,* 273 U.S. 510, in support of their federal constitutional claim. On December 12, 1972 the Supreme Court of Oregon without hearing or opinion denied both the Petition for Reconsideration and the Supplemental Petition for Reconsideration (Pet. App. p. 2a).

Thus as soon as Petitioners learned the facts upon which their claim of denial of due process of law under the Fourteenth Amendment is based, this claim was made promptly in the Court below in which the case was then pending and was denied by that Court without opinion. In these circumstances Petitioners have done everything possible to assert their federal constitutional rights. Therefore, the constitutional question presented, whether the Petitioners were denied a trial before a Judge with a substantial undisclosed business relationship with the opposing party which might prejudice him, is properly before this Court on the petition for certiorari.[1]

---

[1] After the petition was filed herein the United States District Court for the District of Oregon, on February 27, 1973 denied a motion for preliminary injunction in *DeLong et ano.* v. *Hon. Lee Johnson, Attorney General of Oregon* commenced January 10, 1973 to enjoin the collection of the judgment here involved. On appeal Circuit Judge Walter Ely by order dated March 26, 1973 has temporarily restrained collection of that judgment pending present consideration of the application for a stay pending appeal by the Court of Appeals. That collateral action seeks to enjoin collection of the judgment sought to be reviewed here over objection that such action is a suit against Oregon prohibited by the Eleventh Amendment and other procedural objections. That action was commenced solely to protect Petitioners' rights pending the review sought here. In the absence of review here or a stay pending determination of the injunction action Petitioners may be deprived of any avenue of relief by payment of the judgment and Respondent's

On the merits Respondent strangely argues (Br. p. 24) that receipt of a 1967 mortgage loan of $700,000.00 on farm property purchased from the State of Oregon in 1966 for $175,000.00 and on the adjoining property already owned by the Trial Judge's partnership does not show any increase in value of the property as "There was no sale or other transaction to illustrate a value change". Surely such a substantial mortgage loan secured by the real property is a very substantial transaction indicating the value of the property.[2] But even if Respondent's contention is accepted that no increase in the value is thus indicated the alternative must be that the land already had this value, far in excess of the purchase price, at the time of the purchase in 1966.

Respondent seeks (Br. 25) to distinguish the controlling authority of this Court's decision in *Commonwealth, supra,* on the ground that the Trial Judge's undisclosed business transaction was with an agency of the Government of Oregon other than the Highway Commission directly involved here. But the gravity of

---

contention that it has sovereign immunity from suit to recover the amount paid.

Respondent's charge (Br. p. 15) of vexatious litigation by disappointed Petitioners is baseless. All the litigation between the parties is in the present action and the recently commenced federal injunction suit was solely to avoid Respondent's contention that sovereign immunity prevents any suit to recover the amount of the judgment, once it has been paid and covered into the State's general fund.

[2] A value of $650.00 an acre or $1,200,000.00 was placed on the tract of 1836 acres (754 acres purchased from the State of Oregon at an average of $421 an acre and 1082 acres already owned by the partnership) to support the 60% mortgage loan of $700,000.00 by Prudential Insurance Company. (Pet. App. p. 17a).

the Trial Judge's undisclosed relationship with a corporate party in litigation before him cannot turn on which division or branch of the sovereign or private corporation is directly interested in the litigation and which division has an undisclosed business relationship with the Judge. The fact that the right hand may not know what the left hand does in governmental or corporate affairs cannot confer immunity from the legal effects of the wrong conduct.

Respondent also argues (Br. 25) that the undisclosed relationship of the arbitrator with a party in *Commonwealth, supra,* was somehow more substantial than the relationship of the Trial Judge with the party in this case. But this Court states in *Commonwealth* that "there had been no dealings between them [the arbitrator and the party] for about a year immediately preceding the arbitration" and before that had involved "fees of about $12,000.00 over a period of four or five years" (393 U.S. at 146). In this case the Trial Judge's partnership paid off the State of Oregon for the land from the proceeds of the mortgage loan in July 1967 and shortly thereafter accepted assignment of the case for trial without disclosing this business transaction. The facts are more compelling than those found sufficient in *Commonwealth* to disqualify the arbitrator.

Although Judge Sloper now states (Res. Br. App. p. 1-A) that, "According to the best of his recollection" the case was assigned to Judge Jones in March 1968, the documentary evidence (App. p. 1a), supported by other evidence of record (App. p. 1a) indicates that the assignment was determined in November or December of 1967. On December 19, 1967, long before March 1968, Petitioner Travelers' counsel wrote to his client's

Seattle office, obviously describing the very pre-trial conference referred to in Judge Sloper's best recollection as having taken place in March, that "It looks like the case will be assigned for trial to Chief Judge George H. Jones". (App. p. 1a). And Petitioner DeLong's Oregon counsel (now deceased) stated on the record at a hearing on January 30, 1973 in the pending collateral federal injunction suit that in the fall of 1967 at a conference in Judge Sloper's office, counsel were advised that Judge Jones would be the trial judge. "This was in the fall of 1967". (App. p. 1a). Bert Rand, Esq., counsel for Petitioners, also recalls that the announcement of Judge Jones' assignment occurred in November 1967. (App. p. 1a). Obviously, Judge Sloper, who refers to no documentary evidence or notes in placing the pre-trial conference and the assignment, was mistaken by four to five months.

If this were a trivial transaction, the fact that even a short time elapsed between payment of the balance of the purchase price for Colony Farm by the Trial Judge and his partners to the State of Oregon and the assignment of this case to the Trial Judge might have given the Trial Court and opposing party the excuse for non-disclosure, not even claimed here, that it might have been honestly forgotten. In *Commonwealth, supra,* over a year had elapsed between the time of the arbitration and a much smaller transaction between the arbitrator and the opposing party. But here the Trial Judge and his partners paid off the entire balance of the purchase price of $150,000.00 with only a small part of the mortgage loan of $700,000.00 Such a transaction was obviously not a routine frequent transaction in the business activities of the Trial Judge and it cannot reasonably be considered as a small transaction

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with an opposing party which was simply forgotten immediately. Indeed it is not contended by Respondent that the transaction actually was forgotten by the Respondent or the Trial Judge at the time this case was assigned for trial.

Respondent suggests (Br. 18) that petitioners counsel in the separate federal action to enjoin collection of the judgment here sought to be reviewed admitted in an argument that the Trial Judge had not been biased or prejudiced. All that counsel admitted was that the Trial Judge was not being charged with conscious or deliberate fraud (Res. Br. App. pp. 27-A, 28-A) but it was never conceded that the Trial Judge's very profitable transaction with the State of Oregon did not prejudice him, consciously or unconsciously, in favor of the State of Oregon. In fact, in his affidavit in the Supreme Court of Oregon, counsel Meade *in haec verba* stated his belief that the trial judge was prejudiced in favor of Respondent and against Petitioners (Pet. App. p. 9a).

Moreover this Court has repeatedly stated that the issue is not whether in fact the judgment was a result of prejudice, a determination most difficult to make, but whether the Judge had a relationship with one of the parties which might influence his mind in reaching judgment. In *Ward supra,* this Court quoted with approval its language in *Tumey, supra,* that the disqualification is not the exercise of actual prejudice but (409 U.S. at 60):

> "* * * the test is whether the mayor's [the trial judge's] situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold

> the balance nice, clear and true between the State and the accused * * *' ".[3]

In *Commonwealth, supra,* actual bias of the arbitrator in rendering his decision was not claimed but, as here, failure to disclose the business relationship with the other party was claimed.

Significantly Respondent has not questioned the facts of record concerning the substantial business relationship between Respondent and the Trial Judge. Respondent has not challenged the existence of the clear duty of Respondent and Trial Judge to reveal their substantial business relationship. Respondent has offered no explanation whatever why this relationship was not disclosed and Petitioners given the opportunity to decide whether or not to try this case before Judge Jones without a jury. Petitioners' counsel have sworn that if they had known the facts they would have sought disqualification of the Trial Judge under the applicable Oregon statute (Pet. App. p. 50a) which provides an absolute disqualification in these circumstances (Pet. App. 8a-11a).

Instead of offering some explanation for this nondisclosure which caused this case to be assigned to Judge Jones as the only available trial judge (Pet. p. 16 ftn. 9) Respondent falls back on the argument (Br. p. 26) of "lack of diligence on the part of Petitioners in investigation and discovering the relationship * * *."

---

[3] In *Kemp* v. *Rose, 1 Giff.* 258, 265, 65 Eng. Rep. 910, 913, the rule is stated as follows: "Whether in fact the circumstances had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist."

But as this Court makes plain in *Commonwealth* it is the duty of the Court and the other party to disclose any relationship which might raise a question of the Court's partiality. A rule placing upon conscientious counsel the duty, in order to protect their clients, to investigate undisclosed relationships between the prospective trial judge and the other party would be both impractical and mischievous. It would be impractical because it would impose a delicate and difficult task to investigate and discover undisclosed facts of a character which more properly should be voluntarily disclosed by the trial court or the other party.

It would be mischievous to promulgate a judicial rule which would require widespread and indiscriminate investigation of business affairs of judges to discover the happily very few cases in which an undisclosed disqualifying relationship with another party exists. Obviously the appropriate and efficient sanction is to reverse and withdraw the fruits of a suspect judgment and grant a new trial when an undisclosed relationship is discovered. This constitutional sanction will force timely disclosure in most cases and should be applied here. No lesser sanction is practical or available. Moreover, the authorities cited by Respondent (Br. p. 22) do not support the claimed lack of diligence of Petitioners in uncovering the kind of disqualifying relationship herein involved. For example, *Hoffa* (245 F. Supp. 772) and *Hutton* (316 F. Supp. 698) involved alleged expressions of prejudice by the Trial Judge during the period of the trial which were not, as here, information within the exclusive possession of the other party and the Trial Judge. Similarly *Mayo* v. *Beber*, 177 Cal App. 2d 544, involved prior knowledge, not present here, of the complaining plaintiff concern-

ing prior presentation of the defendant in a similar malpractice case by other members of the Trial Judge's former law firm. And *Silas* v. *Proctor Coal Co.*, 272 Ky. 477, 114 SW 2d 749, involved alleged political bias of the Trial Judge against the plaintiff's attorney which was known to that attorney if it existed.

Respondent deplores (Br. 14) that a reversal here would require retrial of a long and complex litigation. That is true but this is the risk Respondent assumed when it failed to disclose the business relationship with the Trial Judge. A substantial error at trial always involves the possibility of retrial and where, as here, the constitutional right of Petitioners to an impartial tribunal was violated to Respondent's advantage nothing less than a reversal and retrial can vindicate the constitutional rights involved.

In view of the fact that Respondent does not dispute the incontestable facts of record of the business relationship with the Trial Judge or the fact that it was not disclosed to Petitioners this Court might deem this an appropriate case for the summary exercise of its jurisdiction by granting the petition for the writ of certiorari and simultaneously reversing the judgment of the court below and remanding the case for new trial on authority of this Court's decision in the *Commonwealth* case, *supra.*

II. Trial Court's Discrediting of Petitioner's Evidence Denied Due Process of Law.

Respondent contends (Br. p. 27) that petitioners' objections in the appellate courts below to the trial court's ruling in its opinion (Pet. App. 5a) discrediting Petitioners' evidence because a witness was not called to the witness stand to repeat the substance of his deposi-

tion admitted in evidence do not rise to the level of a federal constitutional objection. But Petitioners did expressly contend both in the Court of Appeals (Petition for Rehearing p. 26) and in the Supreme Court of Oregon (Petition for Review p. 48) that failure to award a new trial after the Trial Court refused to give due weight to Petitioners' evidence "deprives a party of due process of law under the constitutions of the State of Oregon and of the United States." Thus the federal question was duly raised and is available for review.

Respondent suggests (Br. p. 28) that the Trial Court discredited Petitioners' evidence as weak or unsatisfactory because Colonel L. B. DeLong, President of Petitioner DeLong Corporation, did not testify as a "live" witness in addition to giving his disposition which was received in evidence by consent and was taken because of his expected absence in Viet Nam during the trial on government construction work. But it was never suggested to Petitioners either by the Trial Court or Respondent that Colonel DeLong's testimony at the trial was required or desired on any issue in addition to the testimony in his deposition. Petitioners learned for the first time from the Court's opinion that its evidence was being discredited for any such reason. Even in its opinion the Trial Court does not indicate on what issue Petitioners should have produced Colonel DeLong's testimony as the best evidence. It was this combination of circumstances which made the Trial Court's erroneous application of the rebuttable presumption not only reversible error under Oregon Law (Pet. pp. 27-29) but also denial of due process of law when applied in the Court's opinion after the trial and after the Petitioners could do anything to correct the error except on appeal.

III. Declaratory Relief in Respect of U.S. Steel Denied Petitioners Due Process of Law.

Respondent argues (Br. pp. 28-32) that Petitioners' contention (Pet. pp. 23-25) in respect of adjudication of liability for all delays to U.S. Steel Corporation is erroneous because the formal declaratory judgment states that "As between plaintiff and defendants" any and all delay to U.S. Steel was caused by the fault of defendant DeLong Corporation. The opinion does not contain this quoted limitation (Pet. App. 7a) and even with the limitation Petitioners in their separate suit with U.S. Steel Corp. are faced with the defense of collateral estoppel and threatened with being deprived of their day in court on the issue whether any and all delays to U.S. Steel in building the bridge superstructure, from whatever cause, are the fault of Petitioners. Petitioners submit that this gratuitous adjudication of their rights in respect of U.S. Steel Corporation deprived them of due process of law.

IV. Respondent's Fraudulent Exhibits Deprived Petitioners of Due Process of Law

Respondent contends (Br. pp. 11-12) that Petitioners' contention that altered and fraudulent exhibits of Respondent were received in evidence at the trial and substantially influenced the decision does not raise a federal question. But Petitioners in their Supplemental Petition for Reconsideration of Petition for Review filed in the Supreme Court of Oregon on November 30, 1972 set forth the newly learned facts concerning the altered and fraudulent exhibits and submitted that a fraud had been committed on the Court, citing *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, and *Oregon-Washington Railway &*

Navigation Company v. *Reid*, 155 Or. 602, 65 P. 2d 664 (1937). Petitioners submit that the judgment based on these exhibits did deprive them of a fair trial and due process of law that a federal question appropriate for review here is presented (Pet. 33).

CONCLUSION

Respondent neither denies the very substantial business relationship with the Trial Judge nor makes any effort to explain or excuse the complete failure to disclose it when this case involving complex issues, great public interest and serious potential financial liability for Respondent as well as Petitioners was assigned to the Trial Judge for trial without a jury. Inadequacy of administrative standards to control business relationships of a judge with parties appearing before him is generally recognized and efforts to improve the situation are being made such as the Code of Ethics for Federal Judges very recently adopted by the United States Judicial Conference prohibiting many business activities and the Code of Judicial Conduct adopted August 16, 1972 by the American Bar Association. But these administrative regulations are not automatically self enforcing or easily enforced by the parties affected. A landmark decision by this Court, which is lacking in this area, would instruct all judges in the federal and state systems with the constitutional importance of strict observance of the administrative standards and would provide compliance which cannot be obtained in any other way. It is submitted that this case provides this Court with the opportunity to lead and give the necessary emphasis to the efforts to assure an impartial judiciary which is essential for the public support of the judiciary.

For all the reasons stated it is respectfully submitted that petition for certiorari should be granted.

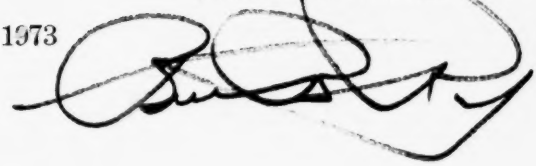
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Counsel for Petitioners

April 13, 1973



APPENDIX

APPENDIX

DISTRICT OF COLUMBIA, SS:

Affidavit

BERT B. RAND, being duly sworn, deposes and says:

1. I am a member of the Bar of the Supreme Court of the United States and of the Bar of the United States District Court for the District of Columbia, and a member of the firm of Trammell, Rand, Nathan & Lincoln, with offices at 1730 K. Street, N.W., Washington, D.C.

2. I represent Appellant DeLong Corporation as associate counsel in the case pending in the United States District Court for the District of Oregon as *DeLong Corporation and The Travelers Indemnity Company* v. *The Honorable Lee Johnson, Attorney General of the State of Oregon*, Case No. 73-20, and am familiar with all pleadings and transcripts of the hearings in said District Court. I was also actively engaged in trying the case of *State of Oregon, by and through its State Highway Commission* v. *DeLong Corporation and The Travelers Indemnity Company*, Case No. 59323 before the Honorable George A. Jones in the Oregon Circuit Court for Marion County and I am familiar with the proceedings had in the State Court.

3. I have examined the affidavit of Hon. Val D. Sloper, Presiding Judge of the Circuit Court of Oregon for the County of Marion, Third Judicial District, dated 27 March 1973, submitted as Exhibit A (App. p. 3-A) to Appellee's Memorandum in Opposition to Appellants' Application for Injunction pending Appeal. After thorough research of the files, I believe that certain statements made therein are erroneous.

4. In an effort to place the date of assignment of Judge Jones to the case, Judge Sloper states that it occurred during the first or second week immediately subsequent to a pre-trial conference in his office of March, 1968. He further states that at that very conference the attorneys present gave an estimate as to the length of the trial

"depending on whether or not a jury was empaneled". I do not recall such a pre-trial conference nor do the records of myself or my associate counsel show any such pre-trial conference having taken place in March of 1968.

5. The transcript of a pre-trial conference before Judge Sloper of October 30, 1967, shows that the question of whether or not a jury was to be empaneled was resolved at that time. Judge Sloper stated, "I will consider that the case be tried without a jury in Marion County, and I will deny the Defendant DeLong's motion for a change of place for trial". (Tr. Hearing 10/30/67, p. 2). On the basis of the transcript aforesaid, my own recollection and all the files of the case, I believe that Judge Sloper referred to the pre-trial conference of October 30, 1967 and erroneously placed its date into "the first or second week of March 1968".

6. To the best of Judge Sloper's recollection he assigned the case to Judge George A. Jones "one week prior to March 18, 1968" (Aff. Exh. A, lines 28-29). Examination of the files of counsel for Travelers Indemnity Company revealed that on December 19, 1967, Lamar Tooze, Sr., chief counsel for Travelers, sent a letter to the Assistant Claims Manager of the Travelers Indemnity Company in Seattle, Washington, stating, in part, as follows:

> "As I reported to you when you called by telephone on December 14, the above case has been set for pre-trial conference on Monday, February 19 and reset for trial to begin on Monday, March 4, 1968.
>
> I failed to inform you that it looks like the case will be assigned for trial to Chief Judge George A. Jones. It is my impression that the Plaintiff's attorneys are disappointed that Judge Sloper is bowing out of the trial of this case—probably due to the rather unfortunate statement by Mr. Rhoten [counsel for the State] at a conference with the Judge some weeks ago, when he stated that the Plaintiff would be willing to try the case without a jury if it was tried before

Judge Sloper. I believe that we told you about this incident previously."

7. The letter of General Tooze accords with my recollection that we were notified by Judge Sloper in a meeting in Salem, Oregon in November, 1967, that, as we had anticipated for some time previously thereto, Judge Jones would try this case. It was at that time, and in Judge Sloper's chambers, that I first met Judge Jones. My travel records indicate that this meeting must have occurred either between November 13 and 17, 1967, or between December 5 and 9, 1967. I was in Salem and visited the courthouse during both periods. It is my recollection, however, that the announcement of Judge Jones' definite assignment occurred in November 1967.

8. The recollection of George W. Mead, now deceased, apparently was the same as mine. At a hearing below, he stated to the Court:

> "So this left to us, in Salem, two trial judges, the third trial—the other trial judge was handling domestic relations cases, and this left to us Judge Sloper and Judge Jones, and Judge Jones, in the fall of 1967, at a conference in Judge Sloper's office, in his chambers, was brought into the case and we were advised that he would be the trial judge at that time. This was in the fall of 1967."

—(Hearing, U.S.D.C. of Or. 1/30/73, Tr. p. 39).

FURTHER AFFIANT SAYETH NOT.

/s/ BERT B. RAND
Bert B. Rand

Subscribed and sworn to before me, this 11th day of April, 1973.

/s/ LOUISE G. BURROUGHS
Louise G. Burroughs
Notary Public
My Commission expires 9-30-75.

FILE COPY

Supreme Court, U. S.
FILED
MAY 31 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, *by and through its* STATE HIGHWAY COMMISSION, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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v.

STATE OF OREGON, *by and through its* STATE HIGHWAY COMMISSION, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners pray that this Court grant a rehearing of its Order of May 7, 1973, denying the petition for writ of certiorari, and that a rehearing be granted and a writ of certiorari issue.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The following substantial grounds within the provisions of Rule 58.2 which have not been previously presented, are available to the petitioners:

1. Effect of Recent Decisions Recognizing That the Appearance of Impropriety Effectively Deprives a Party of Due Process of Law.

The highly unusual disclosure of covert activities engaged in by the Government in the Pentagon Papers trial of Daniel Ellsberg and Anthony J. Russo, Jr. prompted Judge W. Matt Byrne, Jr. of the United States District Court for the Central District of California to dismiss all charges against the defendants.

Although the court was unable to ascertain the effect the government's covert activities may have had on the government's case,[1] the Court, recognizing the overwhelming appearance of impropriety, held:

> "The totality of the circumstances of this case which I have only briefly sketched offend a sense of justice. The bizarre events have incurably infected the prosecution of this case."

---

[1] "Much information has been developed, but new information has produced new questions, and there remain more questions than answers."

"Of more serious consequences is that the defendants and the court do not know the other activities in which the special unit may have been engaged and what has happened to the results of these endeavors."

"There is no way the defendants or the court or, indeed, the government itself can test what effect these interceptions may have had on the government's case."

(Unreported opinion. Excerpts from the official transcript of Judge Byrne's ruling appearing in the May 12th, 1973, issue of The Washington Post.)

In a recent decision of the Second Circuit affirming a decision of the District Court for the Southern District of New York disqualifying appellants' counsel on the ground that his representation of them constituted a breach of Canon 4 of the Code of Professional Responsibility, the Court held:

> "We have said that our duty in this case is owed not only to the parties—who by chance consist of a group of smaller competitors arrayed against the industry giant—but to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." *Emile Industries, Inc., et al.,* v. *Patentex, Inc. and Burlington Industries, Inc.,* Docket Nos. 72-2048-2053 (Decided May 9, 1973)

These decisions applying the appearance of impropriety test to the prosecution and to attorneys address themselves to the vital concerns of the public's acute interest in the scrupulous administration of justice. The ultimate administration of justice rests in the hands of the courts. While the public demands propriety from the prosecution from attorneys, it demands and, *a fortiori,* is entitled to the highest degree of fairness and impartiality from its judges. Yet, there remains a great paucity of decisions on disqualification of a judge because of a substantial business relationship with a party involved in a case before his Court. Extrajudicial discussions of the subject and various Bar Association guidelines are diffuse and inconsistent. Only this Court can give the necessary impetus to

satisfying the public's desire for a fair and impartial judiciary. This Court has never addressed itself to the bounds of judicial business dealings with parties likely to appear before a court. A strict prophylactic rule defining and limiting a judge's extrajudicial conduct is urgently needed.

II. The New United States Judicial Conference's Code of Ethics for the Federal Judiciary Gives Rise to the Urgent Need for Clarification by the Court as to What Action Constitutes an Appearance of Impropriety.

The United States Judicial Conference chaired by Chief Justice Warren E. Burger, adopted the first code of ethics in history directly applicable to the federal bench. The new Code states that borderline areas of disqualification will be governed by the precept, embodied in the ABA's ethical canons since 1924 but never before contained in a federal judicial rule, that regard for the appearance of propriety should induce judges to step out of doubtful cases. It is submitted that jurists today feel that they have a duty to sit unless clearly disqualified. The Conference's edict that judges should disqualify themselves where the appearance of propriety is in doubt furnishes little guidance as to the type of conduct that would call for disqualification. A decision by this Court requiring disqualification of a judge who engages in a substantial and undisclosed business relationship with a party appearing before him would go a long way toward furnishing guidance to the State Bench and furthering the public's interest in an impartial judiciary.

Nowhere is Shakespeare's observation that "there is nothing either good or bad but thinking makes it so,"

more worthy of consideration than in the realm of the ethical conduct of the courts. With the ebbing tides of public support for our institutions at a crisis level, petitioners urge upon the Court that it assert its unique leadership in assuring an impartial judiciary.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to those grounds described in Rule 58 of this Honorable Court.

HANS A. NATHAN
Counsel for Petitioners

Dated: May 30, 1973

Hans A. Nathan
KHF

TION FILED
MAY 30 1973
FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S MOTION FOR ALLOWANCE OF ATTORNEY'S FEES AND SUPPORTING BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

RESPONDENT'S MOTION FOR ALLOWANCE OF ATTORNEY FEES

Respondent respectfully moves the Court for an Order awarding it a reasonable attorney's fee, either as costs or as damages, and directing the clerk to enter the amount thereof in the body of the mandate, pursuant to Rule 57, par. 6, of the Rules of this Court.

Attacher hereto and incorporated herein by this reference marked, respectively, Exhibits "A" and "B", are the affidavits of Leslie B. Hampton and Bruce M. Hall.

Respectfully submitted,

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Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

WALTER L, BARRIE
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BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR ALLOWANCE OF ATTORNEY FEES

The substantive right to a reasonable attorney's fee n this case, in addition to the usual taxable costs, nitially arises from ORS 743.114, which provides as ollows:

"743.114 Recovery of attorney fees in action on policy. If settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon.
[Formerly 736.325; 1971 c. 123 § 1]"

Pursuant thereto, the trial court awarded plaintiff Respondent here) reasonable attorney's fees in the ial court, as against Defendant, Travelers Indemnity ompany (one of Co-Petitioners here), and such award as affirmed on appeal to the Court of Appeals of the tate of Oregon. *Oregon State Highway Commission DeLong Corporation,* — Or. App. —, 495 P2d 1215, 231-1233, 94 Or. Adv. Sh. 983 (1972). An additional ward was made for attorney's fees in the State Appellate Court.

The proceedings in this Court on Petition for ertiorari were, of course, in the same action commenced, ied and appealed in the Oregon courts. Petitioners ught review by this Court of the state court judgent, and pursuant to the intent of the statue, a furher

allowance should be made herein, taxed as part of the costs in this Court. The statute provides that attorney fees, in a reasonable amount to be fixed by the court ". . . shall be taxed as part of the costs of the action and any appeal thereon." ORS 743.114, *supra*.

When ORS 743.114 is otherwise applicable, the right to attorney fees as therein provided has been uniformly enforced by the lower federal courts, in actions commenced within the District of Oregon. *Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Casualty Co.*, 465 F2d 22, 25 (9th Cir. 1972); *New York Life Insurance Company v. Lee*, 232 F2d 811, 815 (9th Cir 1956); *Staff Jennings, Inc. v. Fireman's Fund Insurance Company*, 218 F. Supp. 112 (D.C. Or. 1962).

Although Rule 57, par. 1, refers to allowance of costs in this Court in "cases of affirmance of any judgment", there would appear to be little doubt that there is similar power upon denial of a Petition for Certiorari.

Rule 57, par. 1, provides that in cases of affirmance, "costs shall be paid by appellant *or petitioner* unless otherwise ordered by the court." This clearly contemplates that costs should be taxed in proceedings on certiorari as well as in direct appeals.

Rule 56, par. 4, also provides that where it appears that a petition for certiorari has been filed although there is no ground for granting such a writ, the court may in appropriate cases adjudge to the respondent reasonable damages for the delay. Or, under par. 2 of the same Rule, damages not exceeding 10 percent may be awarded where an appeal delays proceedings on the

judgment below and appears to have been sued out merely for delay. Either or both of these provisions might also be deemed applicable here.

As to the enabling statute, 28 USC § 1912, it was decided long ago that the authority of this Court to award damages for delay pursuant to Court Rule,[1] under the predecessor to 28 USC § 1912, existed when a writ of error was dismissed for frivolity, as well as when the judgment below was affirmed upon such ground; the statute in its then form (Rev. Stat. § 1010) authorized damages for delay in cases "where, upon a writ of error, judgment is affirmed in the Supreme Court . . . ." *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 33 S. Ct. 80, 57 L. Ed. 140 (1912).

It is also pertinent to observe that where a direct appeal is improvidently taken to this Court, it may be treated as a petition for certiorari, and where in such a case no reasonable ground for certiorari is apparent, this Court may adjudge to the respondent reasonable damages for the delay, and single or double costs. 28 USC § 2103. Certainly if what should have been a petition for certiorari is through improvidence presented as a direct appeal, and damages and costs may be awarded respondent in such case, a like award is also proper where the proceeding was initially presented as a petition for certiorari.

Thus, it is clear that under state law, respondent is entitled to a reasonable attorney's fee from Travelers in this case, as a part of its costs, not only in the trial

[1] Similar to present Rule 56.

court, but in subsequent appellate proceedings. The lower federal courts have allowed recovery of such a fee in cases to which the statute otherwise applies, even though the action was initiated in the federal court system. This Court has ample authority under its rules and 28 USC § 1912 to allow recovery of such a fee in this case, either as "costs" or as damages.[2]

It is obvious from the length and nature of the Petition herein, and of Respondent's Brief in Opposition thereto, that respondent was indeed delayed in proceeding to enforce its judgment and that it has incurred substantial actual costs, including attorney fees, as a result of the ill-founded proceeding in this Court.

Under these circumstances, we submit that it is not only permissible, but altogether reasonable, fair and just that respondent be allowed a reasonable attorney's fee in this Court.

As to the amount, respondent has submitted with its Motion the Affidavit of Bruce M. Hall, a qualified and experienced attorney and a member of the bar of this Court, expressing the expert opinion that a reasonable attorney's fee to respondent for the proceedings in this Court would be $22,500 to $25,000.

If this be deemed an appropriate case for imposition of delay damages under Rule 56, such rule allows an award up to 10 percent, in addition to interest, of the amount of the judgment. The principal amount of the judgment in this case, exclusive of interest, attorney's fees and costs, is $2,671,864.19[3]. Ten percent of that sum

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[2] If an award is deemed appropriate as costs authorized under ORS 743.114, it appears that it would properly be as against Travelers Indemnity Company only; if the Court deems such an award appropriate as damages it would apparently be entered as against both petitioners.

[3] See opinion below, 495 P2d 1215, 1219.

is $267,186.42. While respondent does not contend that an award of 10 percent damages would necessarily be appropriate in this case, this nevertheless indicates that Mr. Hall's opinion as to a reasonable attorney's fee is not disproportionate.

If this case had originated in the Federal District Court for Oregon it would be appropriate to file this motion in that court. *Perkins v. Standard Oil Company of California,* 399 U.S. 222. We are assuming that in a case originating in the Oregon state courts the motion should be filed in this Court.

Respondent respectfully urges that this Court exercise its authority to award $22,500 to $25,000, or such other amount as it deems reasonable as and for respondent's attorney fees in this matter, and direct that such award be entered in the mandate, pursuant to Rule 57, par. 6.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

WALTER L. BARRIE
Assistant Attorney General
and Counsel

LESLIE B. HAMPTON
Assistant Chief Trial Counsel

By Leslie B. Hampton
Counsel of Record
State Office Building
Salem, Oregon 97310
Phone (503) 378-4402

Exhibit "A"—Affidavit

In the Supreme Court of the United States

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, Leslie B. Hampton, being first duly sworn depose and say that:

I am an Assistant Attorney General, and counsel for Respondent in the above-captioned cause. That I have been associated with the preparation and trial of this case since approximately June, 1967. I participated in all phases of the deposition and discovery proceedings and was in daily attendance during the lengthy trial and supplemental procedings in the State trial court.

I was directly involved with the appeal of this case in the State appellate courts and had a substantial part

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in the planning of the State's defense to the appeal and the planning and review of the State's Briefs in said State Appellate courts.

I have been directly responsible for Respondent's defense to Petitioner's Petition for Writ of Certiorari in this case.

The Highway Commission retained attorney A. H. Johansen to assist me in Respondent's defense. Mr. Johansen is a former Assistant Attorney General and participated in all phases of the preparation and trial of this cause in the State trial courts and in the State appellate courts. He was primarily responsible for writing the Respondent's Brief in the Court of Appeals of the State of Oregon, which Brief is part of the designated record herein. Mr. Johansen resigned from the Attorney General's staff on October 31, 1970. Thereafter, he was retained to assist in the completion of the state appellate court proceedings.

As an Assistane Attorney General, I keep time records recording the time devoted to individual assignments. I devoted 161 hours of my time exclusively to this proceeding. Mr. Johansen devoted 71 hours of his time exclusively to this proceeding. All but 10 hours of his time has been billed to the Highway Division. The balance will be billed at the end of this month. Mr. Johansen and I have been admitted to practice approximately 15 years and 20 years respectively. Both of us have had substantial experience in the trial courts and the appellate courts of Oregon. In my opinion the total

time devoted to this proceeding was reasonable and necessary.

DATED on the 25th day of May, 1973.

LESLIE B. HAMPTON
Assistant Chief Trial Counsel

Subscribed and sworn to before me this 25th day of May, 1973.

JUDY A. LeFORCE
Notary Public for Oregon
My Commission Expires: 1-28-77

SEAL

Exhibit "B"—Affidavit

In the Supreme Court of the United States

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

STATE OF OREGON)
) ss. AFFIDAVIT
County of Multnomah)

I, Bruce M. Hall, being first duly sworn, depose and say:

That I am a practicing attorney in the city of Portland, Oregon. That my firm is Hall and Novak, 400 Jackson Tower, Portland, Oregon. My practice includes matters in the Federal Courts, including the District Court for Oregon, the Court of Appeals, Ninth Circuit and the United States Supreme Court.

I am generally familiar with the pleadings and issues in the State court trial of this proceeding. I testified for

the Highway Commission at the hearing to set a reasonable attorney fee in the trial court.

I have examined the Briefs filed by the Petitioners and the Respondent, State of Oregon, in this proceeding. I have been advised by counsel for Respondent that 232 hours of attorney time have been devoted to this proceeding.

Considering the novelty, magnitude and complexities of the litigation, the time and labor involved, the ability and standing of the attorneys performing the services and the ability and standing of opposing counsel, the customary charges of the bar for similar services, the amount involved and the results obtained for the client, it is my opinion that an attorney fee ranging from $22,500 to $25,000 would be a reasonable sum to be awarded Respondent herein.

DATED this 24th day of May, 1973.

BRUCE M. HALL
Attorney at Law

Subscribed and sworn to before me this 24th day of May, 1973.

STEPHANIE SLATER
Notary Public for Oregon
My Commission Expires: 1/24/75

SEAL